(17,297, 17,298, 17,299, 17,300.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. ~~[illegible]~~ 29

EMILIE SAXLEHNER, PETITIONER,

vs.

THE EISNER AND MENDELSON COMPANY.

No. ~~[illegible]~~ 30

EMILIE SAXLEHNER, PETITIONER,

vs.

SIEGEL-COOPER COMPANY.

No. ~~[illegible]~~ 31

EMILIE SAXLEHNER, PETITIONER,

vs.

RUDOLPH GIES.

No. ~~[illegible]~~ 32

EMILIE SAXLEHNER, PETITIONER,

vs.

LOUIS MARQUET.

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a United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
EISNER & MENDELSON COMPANY, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
SIEGEL-COOPER COMPANY, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
RUDOLPH GIES, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
LOUIS MARQUET, Defendant, Appellee.

Transcript of Record.

Appeals from the Circuit Court of the United States for the Southern District of New York.

1 Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.
In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Emilie Saxlehner brings this bill of complaint against Eisner & Mendelson Company, and thereupon your orator complains and says, upon information and belief:

1. That your orator is the widow of Andreas Saxlehner, deceased, and resides at the city of Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary.

2. That the defendant the said Eisner & Mendelson Company during the time when the acts hereinafter complained of
2 were committed was, and now is, a corporation duly incorporated under the laws of the State of West Virginia, having an office for the transaction of its business in the city of New York, and is a citizen of the State of West Virginia.

3. That the said Andreas Saxlehner, late of the city of Budapest, in the Kingdom of Hungary, was at all the times herein mentioned, until the 24th day of May, 1889, the proprietor of a certain well situated at Örsöd, within the city limits of the city of Buda (otherwise known in the German language as the city of Ofen), which city has for about twenty-five years last past been, and is now, united with the city of Pest, under the name of Budapest, in said

Kingdom of Hungary, the waters of which well possess valuable medicinal properties.

4. That in or about the year 1863 said Andreas Saxlehner commenced to bottle the waters of said well and to sell the same in the market, and for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market, adopted the arbitrary and fanciful name or trade-mark of "Hunyadi Janos" for his said bitter waters.

5. That by reason of the great care exercised by him in the business of obtaining, caring for and bottling said waters and selling the same in the market, and the valuable properties of said water, said business soon increased and additional territory was thereafter acquired by said Andreas Saxlehner in which new wells, all giving forth the same water, were opened by him, all being situated near said first-mentioned well, and in a valley surrounded by considerable hills, the geographical name of which valley and territory contained in it is Örsöd, and thereupon said Andreas Saxlehner applied said name of "Hunyadi Janos" to the bottled water of said springs sold by him in the market.

3 6. That at or about the time when said Andreas Saxlehner adopted said name of "Hunyadi Janos" as aforesaid he also adopted a characteristic and novel style of bottles in which said water was sold by him in the market, the same being of a straight shape with a short neck to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos Budai Keserûviz" (meaning Hunyadi Janos bitter water of Buda) together with a portrait supposed to be the portrait of the mediæval Hungarian hero Hunyadi Janos stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which label were a division of the same into three longitudinal fields, the middle field bearing said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of said label, the color of the middle field being red. That thence hitherto said natural mineral waters bottled and sold by said Andreas Saxlehner in Hungary and other European countries and in all the markets of the world, have been known and called by said name and trade-mark of "Hunyadi Janos" water. That the said name "Hunyadi Janos" is in no way descriptive of the nature or quality of the water of the said well or wells, but was adopted by the said proprietor as a fancy or ideal name and as a trade-mark to distinguish the water of his said wells in commerce from all other waters.

7. That soon after said business of bottling and exporting said Hunyadi Janos water had been commenced by said Andreas Saxlehner in the year 1863, said water, named, bottled and labeled as aforesaid, became popular and was exported to and sold in all the principal countries of Europe and also in the United States of America. That in the countries inhabited by the Latin races the word "Janos" became the common appellation of said water, it

4 being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name

"Hunyadi" became the common appellation thereof, it being known as "Hunyadi water." That in the month of March, 1876, said Andreas Saxlehner executed a contract to a corporation known as the "Apollinaris Company, Limited," of London, by which he granted to said company the exclusive right to sell his said natural "Hunyadi Janos" bitter water in Great Britain, its colonies and possessions and the United States of America, and other transmarine countries for the term of ten years, which contract was thereafter further extended and terminated on the 25th day of March, 1896.

8. That about the time when said contract was entered into a label was designed to be used on the bottles of such water which were to be sold through said "Apollinaris Company, Limited," of substantially the same contents and characteristic parts as the label theretofore used, but of a different color, the body of the label being of blue color, while the red color of the central field was substantially retained. That the name "Hunyadi Janos," together with the historical portrait and the name of "Andreas Saxlehner" were retained on said label in the same manner as before, as was also the division into three longitudinal fields; and the general style of the bottles, as also the capsule and imprint thereon above described remained the same. That said label was substantially like the label used by your orator, the successor of Andreas Saxlehner in said business, as hereinafter referred to. That soon thereafter there was added to said blue and red label a small narrow strip on the top thereof in the same blue color containing the printed words "Sole exporters: The Apollinaris Company, Limited, London," which strip has been since retained, the reading of the print being thereafter changed to "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

9. That ever since the adoption of said blue and red label, as aforesaid, in or about the year 1876, large quantities of such bitter water thus bottled and labeled were exported by the said Andreas Saxlehner through said Apollinaris Company, Limited, to the United States of America, and there sold to the public, and said water became known in the United States of America under the name of "Hunyadi water," and became known under the name as the property of said Andreas Saxlehner, and was ordered and sold under such name, the same being an abbreviation of the name "Hunyadi Janos." That a large traffic and business in exporting to the United States, and vending therein said water, was established and continuously carried on and is now carried on by your orator as successor in business of said Andreas Saxlehner.

10. That on May 24, 1889, said Andreas Saxlehner died, and your orator, his widow, thereupon succeeded him in said business of bottling and exporting said Hunyadi Janos water, and became and is the proprietor thereof.

11. That since the termination of said contract with said Apollinaris Company, Limited, your orator has continued said business of shipping to the United States, and selling therein said Hunyadi Janos water, commonly known as Hunyadi water, in bottles and with labels and capsules thereon substantially as hereinbefore last

described, excepting that upon said labels the statement is contained, "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary," in place of an indication of the Apollinaris Company as exporters. That your orator is the sole proprietor of the firm of Andreas Saxlehner, and lawfully doing business in Austria-Hungary, under said firm name.

12. That on or about the 12th day of November, 1886,
6 said Andreas Saxlehner duly made application to the United States Patent Office, according to the statute of the United States therefor provided, for registration of the name "Hunyadi" as his trade-mark for natural aperient waters, and such proceedings were thereafter had, that on or about the 5th day of April, 1887, a certificate of registration of said trade-mark "Hunyadi" was duly issued to him by said United States Patent Office, dated on said last-mentioned day, and numbered 14252, to which certificate or a certified copy thereof, ready in court to be produced, your orator refers for greater certainty.

13. That by reason of said sales by your orator and her predecessor in business, and his and your orator's agents as aforesaid, the said word "Hunyadi" upon said label by her used and her predecessor as aforesaid, dealers in mineral waters and the purchasers and consumers of said water generally have come to know and have long known your orator's mineral water under the names and trade-marks, "Hunyadi" or "Hunyadi Janos," and under the said label and in the style of bottles, capsules and labels as before described, and that the water so furnished and sold by your orator in said United States is procured directly from the well or wells aforesaid, and, therefore, to rely upon the said label and trade-mark as an assurance and guarantee of the genuineness, strength and purity of the said water, and your orator alleges that said assurance and guarantee was and is of great value to your orator and to the dealers and consumers of said water. And that said water so sold by your orator has come generally to be known and designated by the trade so called, and by purchasers and consumers of the water in the United States of America by the first and characteristic word of said trade-mark, "Hunyadi," the "Janos" being comparatively seldom used in common parlance in this country.

7 14. And your orator further shows unto your honors that the defendant above named, well knowing the premises and the rights existing in and secured to your orator as aforesaid, but contriving to injure your orator and deprive her of the benefits and advantages which might and otherwise would accrue unto her from the enjoyment of such rights and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsules by your orator and her predecessor, recently and before the commencement of the suit, as your orator is informed and believes, in the city of New York and elsewhere, without license or allowance and against the will of your orator, in violation of the rights of your orator and infringing the said trade-mark, did unlawfully and wrongfully import for sale and sell and offer for sale bitter water not coming from your orator's said wells,

in bottles of identical shape and size as those used by your orator and with certain capsules thereon stamped with a portrait in imitation of that impressed on your orator's capsules, surrounded by a circular inscription and the initials H. L., and with labels on said bottles bearing the name "Hunyadi Laszlo," Budai Keserüviz, and a portrait in the middle field of said label, set in a medallion, all in close and fraudulent simulation of your orator's trade-mark; and that defendant's said labels also further imitate your orator's labels by being divided in three longitudinal fields, covering almost the whole body of the bottle, the color of the middle field being red, and that of the body of the label being blue, and in many other particulars, all contrived to induce the public to take defendant's said water as and in place of your orator's water.

And that other bottles of such water, sold by said defendant imitate your orator's bottles in shape, size and color, capsule and label, being marked with the name "Hunyadi Mátyá's," and bearing a label designed in close and fraudulent simulation of your
8 orator's said label in color, division into three panels and printed matter contained thereon, including a medallion portrait in the central panel and repeated on the capsule.

15. And your orator further shows that the similarity between the said bottles, capsules, labels and names used respectively by your orator and the defendant is so great that the public and consumers and purchasers are likely to be deceived thereby, and are in fact deceived to suppose the water so sold by the said defendant to be that sold by your orator and thereby to cause your orator great loss and damage.

16. That until the year 1890 your orator and her said predecessor in business did not enjoy adequate protection in Hungary in the use of her and his trade-marks, trade names and labels on account of the lack of statutes regulating such matter, by reason of which fact other persons used the name Hunyadi in connection with other names as trade-marks for other bitter waters, and closely imitated your orator's labels, capsules and bottles, and your orator's predecessor was unable to stop such fraudulent practices. That since 1890, the law of Hungary has been changed, and your orator has succeeded in causing all these fraudulent marks and labels to be suppressed by proper proceedings brought for this purpose, including also the use of the name "Hunyadi László" and "Hunyadi Mátyás," and the labels upon which said names were used by the proprietors of the springs from which said defendant's waters came, and that the further use of said names is now a criminal offense in Hungary.

That your orator has duly notified said defendant of her rights and claims in the premises and requested it to desist from such further sales, but said defendant has refused and still refuses so to do.

19. That the value of the matter in dispute between your
9 orator and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

20. That by reason of the said acts done or threatened and intended

to be done by said defendant, all in defiance of the rights of your orator, as aforesaid, great and irreparable loss and injury has been, is and will be caused to your orator, and she has been and is and will be deprived of great gains, profits and advantages which might and otherwise would be obtained and enjoyed; and your orator is informed and believes that the said defendant by reason of the said sales of the said water under the names of Hunyadi László, and Hunyadi Mátyás, and the said labels, capsules and bottles has made and realized large profits and advantages, and now has in its possession or under its control, or subject to its order a large quantity of said waters so bottled, capsuled and labeled which it proposes to sell, but to what extent said sales have been made and how large profits have been derived therefrom, your orator does not know and prays a discovery thereof. And your orator further says that such sales made by the said defendant, and the threats and intention of defendant to make such further sales and said unlawful acts in disregard and defiance of the rights of your orator have the effect to and do encourage and induce others to interfere with the said trade-mark and label, and to violate and disregard your orator's rights.

And, forasmuch as your orator can have no adequate relief except in this court, to the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed and may, according to the best and utmost knowledge, remembrance, information and belief of its officers, full, true, direct and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of such matters, and may be compelled to account for and pay to your orator the profits by it required and the damages suffered by your orator from the aforesaid unlawful acts. But an answer under oath is hereby expressly waived.

Your orator prays that the said defendant, its officers, servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and permanently by the order and injunction of this honorable court from procuring, parting with, selling or attempting to sell within the United States of America any water or liquid not coming from the said wells of your orator under the name or designation of Hunyadi Laszlo or Hunyadi Mátyás or any name or designation in which the word "Hunyadi" occurs, and also from procuring, parting with, selling or attempting to sell within the said limits any such water in any bottle or vessel imitating or resembling in form, color and general appearance those used as aforesaid by your orator and her predecessor in business, or bearing upon it any capsule stamped in any manner imitating or resembling the said capsules of your orator, or any label in form, color, design and general appearance imitating or resembling the said label of your orator on the said bottles of Hunyadi Janos water, and also from procuring, parting with or selling or attempting to sell within said limits any such water put up or contained in bottles resembling and bearing capsules, marks and label- resembling those of your orator or bearing the name "Hunyadi."

And your orator also prays that the defendant may be decreed to deliver up unto your orator or to this honorable court any and all labels in its possession upon which the words "Hunyadi" or Hunyadi Laszlo or Hunyadi Matyas appear, or which are made in imitation of or resembling those adopted and used by your orator, and any and all bottles, whether filled or unfilled, and all capsules
11 which imitate or resemble the bottles and capsules used by your orator for said "Hunyadi Janos" water, and to pay unto your orator all profits derived by the said defendant from the sale of any water under the said name Hunyadi Laszlo or Hunyadi Matyas or any name or designation in which the word "Hunyadi" appears, or any vessel upon which was or is affixed the label or capsules resembling those adopted and used as aforesaid by your orator, as well as the costs of this suit; and that your orator may have such further relief or such other or different relief as to this honorable court shall seem meet and as shall be agreeable to equity.

May it please your honors to grant unto your orator the writ of injunction, as well provisional as permanent, issuing out of and under the seal of this honorable court, commanding, enjoining and restraining the said defendant, its officers, servants, agents, attorneys and workmen, and each and every of them as is hereinbefore and in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court directed to the said defendant, Eisner & Mendelson Company, by a certain day and under a certain penalty to be and appear in this honorable court, there and then to answer the premises and to stand to and abide such order and decree as may be made against *him*.

And your orator will ever pray, &c.

BRIESEN & KNAUTH,
Complainant's Solicitors.
ANTONIO KNAUTH, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, } *ss:*

Kalman Saxlehner, being duly sworn, deposes and says: That he resides in the city of New York; that he is the resident agent
12 in the United States of the complainant in the above-entitled suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated on information and beltef, and that as to those he believes it to be true; that the reason why this affidavit is not made by the complainant is that she is not within the United States, but is in the Kingdom of Hungary.

KALMAN SEXLEHNER.

Sworn to before me this 28th day of April, 1897.

MAURICE BLOCK,
Notary Public, N. Y. County.

[SEAL.]

Replication in usual form to defendant's answer to the bill of complaint was filed August 2, 1897.

13 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
against
EISNER & MENDELSON COMPANY, Defendant. } In Equity.

The Answer of The Eisner & Mendelson Company, the Defendant, to the Bill of Complaint of the said Complainant.

This defendant, now and at all times hereinafter saving and reserving to itself all benefits and advantages of exception which can or may be had to the many errors, uncertainties and other imperfections in the complainant's bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant answering says:

1st. This defendant admits the allegations set forth and contained in the 1st, 2d and 3d sections of the bill of complaint herein.

2d. This defendant further answering alleges, that it has no knowledge or information save and except as stated in the bill of complaint herein, with regard to the allegations contained in the 4th, 5th, 6th and 7th sections of the bill of complaint herein (ex-
14 cept with regard to that portion of the 7th section of said bill of complaint relating to the contract executed in the month of March, 1876, between Andreas Saxlehner and the Apollinaris Company, Limited, of London, the allegations of which said 7th section in regard to said contract, and the extension and termination thereof, this defendant hereby admits), and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary.

3d. And this defendant further answering alleges, that it has no knowledge or information save and except from the bill of complaint, as to the allegations contained in the 8th, 10th, 11th and 12th sections thereof, and therefore denies the same, and puts complainant to the proof thereof, and to make such proof thereof as she may be advised is material and necessary.

4th. And this defendant further answering denies the allegations contained in the 9th, 13th, 14th, 15th, 19th and 20th sections of the bill of complaint herein.

5th. And this defendant further answering alleges, that it has no knowledge or information save and except from the bill of complaint herein, as to the allegations contained in the 16th section of said bill, and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary, and further alleges that the allegations of said 16th section of said bill are immaterial and irrelevant to the issues of this suit in view of the facts and circumstances hereinafter set forth.

6th. And this defendant further answering alleges, that in the

year 1873, one Ignatius Markus was the proprietor of a certain well or spring situated within the city limits of the city of Buda,
15 which city has for about twenty-five years last past been and is now united with the city of Pest under the name of Budapest, in the Kingdom of Hungary, the waters of which well or spring possessed valuable medicinal properties, and in the year 1873 requested the proper official to be allowed to call the said spring "Hunyady Matyas mineral spring" or "Hunyady Matyas spring," and the waters thereof which were being bottled and sold by him or about to be bottled and sold by him, "Hunyady Matyas," and also requested the proper authority for leave to register said title "Hunyady Matyas" as a designation or denomination of said spring or well and of the waters thereof.

That said request and claim of said Ignatius Markus for said leave to call his said spring or well and the waters thereof "Hunyady Matyas," and to register the same under the then Hungarian trade-mark law, was contested by Andreas Saxlehner, the proprietor of the Hunyadi Janos spring, on the grounds that the said title "Hunyady Matyas" interfered with the title "Hunyadi Janos," and further that the waters of said "Hunyady Matyas" spring were not of good or valuable medicinal effect or quality.

And this defendant further answering alleges, that the decision of the said official before whom this controversy first came, was favorable to the said Andreas Saxlehner, and adverse to the claim of said Ignatius Markus, and by said decision the right of the said Ignatius Markus to call his spring by the said title or designation was denied.

And this defendant further answering alleges, that thereupon said Ignatius Markus appealed from said decision to the royal Hungarian ministry of agriculture and commerce, the tribunal of last resort in such matters, and on such appeal, said ministry after consideration of the evidence on both sides, reversed the decision of the lower tribunal and decided in favor of said Ignatius Markus and against said Andreas Saxlehner, deciding in favor of said
16 Markus on both issues, namely, that the names or designations "Hunyadi Janos" and "Hunyady Matyas" represented two decidedly distinguished titles, and also, that the said "Hunyady Matyas" spring and the waters thereof contained valuable medicinal qualities equally good in their elements, qualities and effects with those of the "Hunyadi Janos" waters, and thereupon granted the request of said Ignatius Markus to register the name or title "Hunyady Matyas" as a denomination of the waters of his said spring or well.

7th. And this defendant further answering alleges, that thereafter the said Ignatius Markus continued to bottle and sell the waters of his said spring by and under the name of "Hunyady Matyas" for several years thereafter, when the said spring and the good will thereof was sold and disposed of for a valuable consideration by said Markus to one Heinrich Mattoni, who thereupon in accordance with the requirements of the then Hungarian trade-mark law registered in the proper office the title "Hunyady Matyas" as a denom-

ination or designation of said spring, and as the successor to the same of the said Ignatius Markus, and this without any claim of interference on the part of Andreas Sexlehner, the proprietor of the "Hunyadi Janos" spring.

8th. And this defendant further answering alleges, that the word "Hunyadi Janos" or anglicized "John Hunyadi" was so named or called by Andreas Saxlehner after a celebrated Hungarian hero of that name. That the surname "Hunyadi" is a common one in Hungary and means of or from Hunyad. And that such name by reason of its being a common one in Hungary is in and of itself incapable of exclusive appropriation by any one, being a common descriptive personal name and also being used to designate certain districts and towns in Hungary, and has been so used as a common descriptive name in various ways in Hungary for very many
17 years, and was so used in the year 1889, when the defendant herein became the sole lessee of the said "Hunyady Matyas" spring as hereinafter set forth.

9th. And this defendant further answering alleges, that in the year 1889, the word "Hunyadi" or "Hunyady" in and of itself and used by itself had become a generic term describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary, and that in addition to the "Hunyady Matyas," several of such wells had been registered under the Hungarian trade-mark law, the products of such wells being distinguished from each other by the word, with which the said "Hunyadi" or "Hunyady" was associated. That among such wells other than the "Hunyady Matyas" the most prominent were the "Hunyadi Arpad," "Hunyadi Bela," and "Hunyadi Laszlo," and that as the defendant is informed and believes, in or about the year 1878, Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring had endeavored to stop by legal proceedings, the sale of said "Hunyadi Laszlo" water under that name, but was defeated in such legal proceedings, and the sale of such "Hunyadi Laszlo" water allowed by and under the name or designation "Hunyadi Laszlo" and by and under its label, and that before the year 1889, Andreas Saxlehner had abandoned all claim or right to the exclusive use or appropriation of the word "Hunyadi" or "Hunyady" in and of itself as applied to his bitter waters, and had acquiesced in the use of the said word by the various proprietors of "Hunyadi" springs in Hungary to designate their springs by and under said generic term and in the distinguishing of their specific "Hunyadi" spring from his own "Hunyadi Janos" spring by the different specific designations "Hunyady Matyas," "Hunyadi Arpad," "Hunyadi Bela," etc., and had specifically acquiesced in and acknowledged the use of the said word as a generic term by himself registering the
18 words "Hunyadi Corvin" and "Hunyadi Erzebet" as titles or designations of bitter-water mineral springs of which he was the proprietor, under the then Hungarian trade-mark law.

10th. And this defendant further answering alleges, that in the year 1889, at the time when the defendant herein acquired the sole right to sell in the United States, the waters of the "Hunyady

Matyas" spring and became the sole lessee thereof, as hereinafter set forth, the label of the "Hunyadi Janos" water as set forth in the bill of complaint was composed of three parts, or a threefold division, consisting of a central red panel with two wings, such central red panel having as its most prominent and distinctive feature a medallion showing the picture of a knight or Hungarian hero, and had been for many years the common mode of labelling the said "Hunyadi" bitter waters before referred to, to the knowledge and with the acquiescence of said Andreas Saxlehner, such labels being distinguished from his "Hunyadi Janos" by their specific details, but having as their common characteristic, and as their common mode of labelling, the threefold division into three parts with the center red panel and two wings, and with a medallion head on the front of said red panel, and that particularly and especially at the time that Ignatius Markus had had his controversy in 1873, with said Andreas Saxlehner with reference to the registration under the then Hungarian trade-mark law of his said title "Hunyady Matyas" as a designation of his said bitter-water spring, he (Markus) had then used said mode of labelling, namely, the threefold division label with a center red panel and two wings, the same, however, being distinguished from the "Hunyadi Janos" and the other "Hunyadi" waters by its specific details, and that thereafter he and his aforesaid successor, Heinrich Mattoni, had used the said label in connection with the words "Hunyady Matyas" to
19 designate the "Hunyady Matyas" bitter water, and had so used the same until the year 1889, and had registered the same as required under the Hungarian trade-mark law in connection with the words "Hunyady Matyas" to designate and distinguish the "Hunyady Matyas" bitter water, and the said label was being so used at the time in 1889 when the defendant herein became as hereinafter set forth the lessee of the said "Hunyady Matyas" spring.

11th. And this defendant further answering alleges that the allegation in the bill of complaint that Andreas Saxlehner adopted a characteristic and novel style of bottle for containing his "Hunyadi Janos" water when he adopted such name for his water, is not true, but that the shape of said "Hunyadi" bottles was common to the trade, and that a number of mineral waters were at the time he so adopted the name "Hunyadi Janos" put up for sale and sold in Hungary, in bottles of a similar shape, and that bottles of a similar shape had been for years prior to 1889 used for putting up different mineral waters in Hungary, and that such bottles were common at that time to the mineral-water trade in Hungary and were known so to be by the said Andreas Saxlehner, and especially and particularly it was known to him that since 1873 continuously down to the year 1889 and in that year, "Hunyady Matyas" water had been continuously put up for sale and sold in Hungary in bottles of the same shape, and of similar shape to that alleged in the bill of complaint herein as being the "Hunyadi Janos" characteristic and novel style of bottle, and that said Andreas Saxlehner had never up to that time asserted and made any claim to the exclusive use

or appropriation of said style of bottle, and had acquiesced in the use of the bottle in which the "Hunyady Matyas" water had as aforesaid been put up for sale and sold in Hungary, and that said Andreas Saxlehner had never during said period asserted or
20 claimed any exclusive right to the capsule employed by him as set forth in the bill of complaint for his "Hunyadi Janos" water, but that the said capsule had been well known to and employed by the trade in Hungary for Hungarian mineral waters, and was a common and well-known trade capsule incapable of exclusive appropriation by any one, and its use as such common trade capsule for mineral waters, had long prior to the year 1889, been known to, recognized and acquiesced in by the said Andreas Saxlehner.

12th. This defendant further answering alleges, that in or about the year 1886, "Hunyadi Arpad" bitter water commenced to be imported into the United States by the proprietor of the "Hunyadi Arpad" spring or well at Budapest, Hungary, or through his American agents, the said "Hunyadi Arpad" water being put up for sale and sold in like bottles and in like capsules to those in which the same had been sold in Hungary, and which bottles and capsules were similar to those of the "Hunyadi Janos" waters then imported into the United States by the Appollinaris Company, to which company Andreas Saxlehner had given by contract the exclusive right to sell said "Hunyadi Janos" water in the United States and to which bottles and capsules the complainant herein now claims the exclusive right as the claimed successor of said Andreas Saxlehner.

And this defendant further answering alleges, that the labels affixed to said bottles of "Hunyadi Arpad" water consisted of a threefold division and were divided into three parts, composed of a certain red panel with two blue wings, and having a medallion head on the front of said panel, and had printed on said label the words "Hunyadi Arpad" designating said water.

13th. And this defendant further answering alleges, that in or about the year 1887, Heinrich Mattoni, who was then the proprietor of the "Hunyady Matyas" spring at Budapest, Hungary,
21 commenced to import into this country through an American agent the "Hunyady Matyas" water in like bottles and with like capsules and with like labels to the bottles, capsules and labels as those of the "Hunyady Matyas" water of today, and which the complainant herein now claims to be an infringement upon her rights as claimed in the bill of complaint herein, with the exception of the seal-brand label now affixed and for several years prior to this time affixed to the "Hunyady Matyas" bottles by the defendant herein for the purpose of identification and distinguishment, as hereinafter set forth.

14th. And this defendant further answering alleges, that about ten years ago, in or about the years 1886 and 1887, the Appollinaris Company, Limited, brought suits in the circuit court of the United States for the southern district of New York, against the American agents of said "Hunyadi Arpad" and "Hunyady Matyas" waters,

respectively, to prevent the use for any mineral water other than the "Hunyadi Janos," of any name of which the name "Hunyadi" formed a part, and that temporary injunctions were obtained by said complainant, but that subsequently and in the year 1888, on motion of the defendants therein, said injunctions were dis-olved with costs against the complainant on evidence that in Hungary where all the "Hunyadi" waters originated, the word "Hunyadi" was then actually and legally used and for a long time previously had been legally used as part of the names of a number of different mineral waters.

That prior to the time when such injunctions were dissolved and in ample time to take action, the said Appollinaris Company, Limited, notified its principal, Andreas Saxlehner, that such motions to dissolve said injunctions had been made, and requested said Saxlehner to join with said company in opposing such motions for dissolution, and in maintaining and proceeding with said
22 suits, and that said Andreas Saxlehner peremptorily refused to join with and aid or assist pecuniarily or otherwise the said Appollinaris Company in opposing the dissolution of said injunctions and in maintaining and proceeding with said suits, and that after such refusal on the part of said Andreas Saxlehner, and with full knowledge on his part, and his consent and acquiescence thereto, and with his full knowledge of all the facts and circumstances relating thereto, said injunctions were in the year 1888, dissolved, and said suits withdrawn and discontinued, and that thereafter the said "Hunyadi Arpad" and "Hunyady Matyas" waters were sold freely, openly and continuously, and in competition with said "Hunyadi Janos" water, in the United States, in large quantities in the years 1888 and 1889, in the bottles and with the labels and capsules affixed thereto as hereinbefore set forth and by and under the names "Hunyadi Arpad" and "Hunyady Matyas," and with the knowledge, consent and acquiescence of said Andreas Saxlehner and his agents.

15th. And this defendant further answering alleges, that in the year 1889, the Eisner & Mendleson Company of Pennsylvania, was engaged in the business of importing and selling mineral waters and like articles throughout the United States, and that said corporation after a most careful investigation of all the facts and circumstances, and having ascertained the facts above set forth in relation to the history of the "Hunyady Matyas" spring in Hungary, and in its use and sale in said country as above set forth, and its use and sale in the United States as above set forth, and relying on the premises above set forth in relation to the same, and the facts and circumstances above set forth in relation to the history, use and sale of said "Hunyady Matyas" water in Hungary and the United States, entered into a contract with Heinrich Mattoni, the then proprietor of said "Hunyady Matyas" spring, wherein
23 and whereby the said Eisner & Mendleson Company, of Pennsylvania, for a valuable consideration, became the sole and exclusive lessee of said spring for the term of twenty-five years, and acquired the sole and exclusive right to import said "Hunyadi

Matyas" water into they United States for said term, and to sell the same in the United States for the like term.

16th. And this defendant further answering alleges, that thereafter and since March 1st, 1890, the said corporation commenced to sell the same as aforesaid lessee in the United States, by and under the name "Hunyady Matyas," in like bottles and with like capsules and labels affixed thereto as now claimed by the complainant herein to be in violation of her claimed rights as set forth in the bill of complaint herein, and which bottles, capsules and labels were similar to those in which the said "Hunyady Matyas" water had been first imported into and sold in the United States as aforesaid, in or about the year 1887, and similar to the labels, bottles and capsules in which the said "Hunyady Matyas" water had been sold in and under after the dissolution of the injunctions aforesaid in the years 1888 and 1889, and that the said Eisner and Mendelson Company continued under said lease to import into the United States and sell in the United States said "Hunyady Matyas" waters in like bottles and with like labels and capsules used herewith and affixed thereto until in or about the year 1892, when the present defendant herein was organized, and thereupon succeeded in all the rights, property assets and contracts of its predecessor, the Eisner & Mendelson Company of Pennsylvania, and thus became vested with the aforesaid contract of lease given by Heinrich Mattoni to said Pennsylvania corporation, and all the rights and privileges granted in said lease with reference to said "Hunyadi Matyas" water, and that this defendant as successor of said Pennsylvania corporation has
24 since the year 1892 and up to the present time, continuously and openly sold in the United States the "Hunyady Matyas" water imported by this defendant under the terms of said lease, using the name or title "Hunyady Matyas" to designate the same, and importing and selling the said "Hunyady Matyas" water in like bottles and with capsules and labels affixed thereto similar to those used by its predecessor, the said Pennsylvania corporation, and with the knowledge, consent and acquiescence of the complainant herein and its exclusive sellers in the United States of "Hunyadi Janos" water the Appollinaris Company, Limited.

17th. And this defendant further answering alleges, that soon after its predecessor in business, the said Pennsylvania corporation, commenced to sell the said "Hunyady Matyas" water in the United States under its said lease as aforesaid, it commenced to advertise the said "Hunyady Matyas" largely throughout the United States in trade journals and periodicals and in various other ways, in order to give said water publicity and increase and extend the sale thereof, and that among other modes of advertising it sent to and distributed among all the large jobbers and dealers in mineral waters throughout the United States a card or slip showing on one side the "Hunyady Matyas" label in its threefold division and with its chocolate-brown panel in the center and with its two light-blue wings, and on the other side of said card a picture of the three principal springs at Budapest, showing their comparative location and designating the same as "Hunyadi Janos," "Hunyadi Arpad" and "Hunyady

Matyas," and also, setting forth a comparative analysis of the waters of said three springs, and that thereupon and after said cards had been so sent and distributed, the American agent of the Appollinaris Company, Limited, called upon the said Eisner & Mendelson Company of Pennsylvania, at its New York office in the city of New York, and stated that he had no objection to the label of the "Hunyady Matyas" spring as
25 used by the said Pennsylvania corporation, nor to the way in which the said corporation had advertised and was advertising said "Hunyady Matyas" water by and under the name "Hunyady Matyas," with the exception of the analysis of the "Hunyadi Janos" spring as given in detail on the back of said advertising card or slip as aforesaid, but that he objected to such analysis as unfair to the "Hunyadi Janos" water, because it was an old and out-of-date analysis of the "Hunyadi Janos" water, and that thereupon and after said objection of said agent, the said Pennsylvania corporation, the predecessor of the defendant herein as aforesaid, at once discontinued the use of and distribution of said analysis on said advertising card or slip, and that thereafter the Appollinaris Company made no objection to the use by the said Pennsylvania corporation, and the present defendant its successor, of the words "Hunyady Matyas" to designate the waters sold by said corporations under the aforesaid "Hunyady Matyas" lease, nor to said advertising card or slip as corrected nor to its "Hunyady Matyas" bottles, capsules and labels, but with full knowledge of all the facts and circumstances consented and acquiesced in the use of the same, and that the above facts and circumstances above detailed constitute an estoppel upon the complainant herein in this suit.

18th. And this defendant further answering alleges, that in the year 1889, in addition to becoming the lessee of the "Hunyady Matyas" water as above set forth and detailed, the said Eisner & Mendelson Company of Pennsylvania, the predecessor of this defendant in business as above set forth, relying upon the facts and circumstances above detailed in relation to the history of the "Hunyady Arpad" spring and relying upon the fact that in Hungary the word "Hunyadi" had in and of itself become a generic term, became the agent for sale in the United States of the "Hun-
26 yadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela" waters, and at once commenced to sell the same in large quantities. That the said three waters were sold by and under said respective names, and by and under the generic term "Hunyadi," being distinguished from each other in the mineral-water trade of the United States, among druggists and dealers in mineral waters, and by consumers and the public generally, and in writing and speaking and ordering, by emphasizing the word "Arpad," "Laszlo" or "Bela" with which the generic word "Hunyadi" was associated, and which thus distinguished said waters as well as the "Hunyady Matyas" water from the "Hunyadi Janos" water, and that each of said waters "Hunyadi Arpad," "Hunyadi Bela," and "Hunyadi Laszlo" were put up for sale and sold in bottles similar to those of the "Hunyadi Janos," "Hunyady Matyas" and the "Hunyadi Arpad"

bottles as above set forth and with like capsules and with labels consisting of a threefold division into three parts composed of a red center label and two blue wings, said centre label having a medallion picture on its front, and being distinguished from the "Hunyadi Janos" labels by specific details, and by the respective names "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo." That the said Eisner & Mendelson Company, Pennsylvania a corporation, continued to sell the said "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" waters from the time in 1889 when said corporation became the American agent for said waters, during the years 1889, 1890 and 1891 in large quantities and in open competition with the "Hunyadi Janos" water, up to the time in 1892, when said corporation was succeeded in business as aforesaid by this defendant, and thereupon this defendant continued to sell the said waters in like manner and in open competition with the said "Hunyadi Janos" water and in large quantities until some time in the year 1893 when the present complainant stopped said competition so far as regards the "Hunyadi Arpad" and "Hunyadi
27 Bela" water- by purchasing the said springs from their proprietor in Hungary, and thereupon revoked the agency of this defendant to sell said waters, and ceased to import the same in any way into the United States, and that thereafter this defendant continued to sell the "Hunyadi Laszlo" water in open competition as aforesaid with the "Hunyadi Janos" water until some time in the year 1895 when it ceased to import the same.

19th. That by reason of the facts and circumstances above set forth, the word "Hunyadi" had at the time of the commencement of this suit and had for many years previously been a generic term to designate the above-referred-to "Hunyadi" waters, and also a number of other "Hunyadi" waters imported and sold in the United States, of which "Hunyadis" including those above set forth some eleven have been imported and sold in the United States during the last ten years, whereby the word "Hunyadi" has become a generic term design-ing a class of bitter aperient waters imported from Hungary, and that said term "Hunyadi" has so become such generic term in the United States, has been repeatedly and publicly and widely admitted by the Apollinaris Company in its advertisements, actions, conduct and in various and many ways during the last ten years, and that the bottles, capsules and labels in which said "Hunyadis" have been put up for sale and under which they have been sold in the United States have become in their general style, coloring and mode of printing, common to said "Hunyadis," has been repeatedly, publicly and widely recognized and acquiesced in during the last ten years throughout the United States by repeated statements, acts and conduct of Andreas Saxlehner and his authorized agents in the United States during the last ten years.

20th. And for a further and separate defense, and as a specific act showing that Andreas Saxlehner never claimed or asserted any right to the word "Hunyadi" as a trade-mark in and of
28 itself and as dissociated and as discoupled from the word "Janos," but based his right to a trade-mark to the words

"Hunyadi Janos" together and as a word symbol, and this defendant alleges that on August 31st, 1877, said Andreas Saxlehner applied to the Commissioner of Patents for the registration of the word symbol "Hunyadi Janos" as a United States trade-mark, in which said application he stated the essential part of the trade-mark which he had adopted for use in the United States consisted of the word symbol "Hunyadi Janos," and that the said trade-mark for said word symbol was registered September 11th, 1877, as No. 5144, by which proceeding he abandoned all claim of right and all assertion of right to the word "Hunyadi" in and of itself.

21st. And this defendant for this answering alleges that in order to give itself further and additional protection in the use of the words "Hunyady Matyas" to designate the "Hunyady Matyas" water sold by it in the United States, and in and to the essential parts of its "Hunyady Matyas" label used as aforesaid, by itself and its said predecessor in business, on or about July 21st, 1893, applied to the Commissioner of Patents of the United States for a certain trade-mark for the same, in the statement of which application for said trade-mark, this defendant stated that said trade-mark had been used continuously in its business since March 1st, 1890, in accordance with the facts relating to its use as above set forth, and that thereafter said trade-mark was registered on August 22d, 1893, as No. 23520, as by a reference to said trade mark or a certified copy thereof here in court to be produced will more fully and at large appear, and that since the registration of said trade-mark, the said defendant has used the said trade-mark as stated therein and in accordance therewith.

22d. And this defendant further answering alleges, that in
29 the year 1893, in order to further differentiate and distinguish the "Hunyady Matyas" water sold by this defendant in the United States as aforesaid, from the "Hunyadi Janos" water, and the other "Hunyadi" waters then in the market, and to associate the said "Hunyady Matyas" water with the Eisner & Mendelson Company of West Virginia as its seller in the United States, this defendant adopted and commenced to use as a seller's label, an additional label affixed to and made conspicuous and prominent part of the "Hunyady Matyas" label theretofore used by this defendant and its predecessor in business, showing the representation of a red seal on a white background, and with the word- "Seal brand" on said label to designate the same, and thereafter commenced to advertise throughout the country in various ways the said "Hunyady Matyas" water sold by this defendant as "Hunyady Matyas Seal brand," advertising the same as sold by The Eisner & Mendelson Company, this defendant, and that by reason of the efforts made and money spent by this defendant in so advertising the said "Hunyady Matyas" water as "Hunyady Matyas Seal brand" or "Seal brand," and by its use of said "Seal Brand" label, the said water during the last four years has been and was at the time of the commencement of this suit, known among the mineral-water trade and persons dealing in mineral water, and by the public and consumers generally as "Hunyady Matyas Seal brand" or

"Seal brand" or "Hunyady Seal brand," and by these names has become identified and associated with the said Eisner & Mendelson Company as the sellers of said "Hunyady Matyas" water, and during the last four years has been ordered from and known by the trade generally under said names.

23d. And this defendant further answering denies each and every other allegation in the bill of complaint herein, not hereinbefore admitted or denied.

30 24th. And this defendant further answering says, that the complainant is not entitled to an injunction or an account of profits or any other relief against this defendant as prayed for in the bill of complaint without this that any other matter, cause or thing in the said bill contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray- to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

EISNER & MENDELSON CO.,
[SEAL.] By CHARITY EISNER.

CHARLES G. COE,
Solicitor for Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charity Eisner, being duly sworn, says that he is the secretary of The Eisner & Mendelson Company of West Virginia, the defendant corporation herein. That he has read the foregoing answer subscribed by him and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

CHARITY EISNER.

Sworn to before me this 12th day of July, 1897.
CHAS. WAHLERS,
Notary Public, N. Y. Co.

31 Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
SIEGEL, COOPER COMPANY, Defendant. } In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Emilie Saxlehner brings this bill of complaint against Siegel, Cooper Company, and thereupon your orator complains and says, upon information and belief:

1. That your orator is the widow of Andreas Saxlehner, deceased, and resides at the city of Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary.

2. That the defendant, the said Siegel, Cooper Company, is a corporation duly incorporated under the laws of the State of New York.

32 3. That said Andreas Saxlehner, late of the city of Budapest, in the Kingdom of Hungary, was at all the times herein mentioned, until the 24th day of May, 1889, the proprietor of a certain well situated at Örsöd, within the city limits of the city of Buda (otherwise known in the German language as the city of Ofen), which city has for about twenty-five years, last past, been and is now united with the city of Pest under the name of Budapest, in said Kingdom of Hungary, the waters of which well possess valuable medicinal properties.

4. That in or about the year 1863 said Andreas Saxlehner commenced to bottle the waters of said well and to sell the same in the market, and for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market, adopted the arbitrary and fanciful name or trade-mark of "Hunyadi Janos" for his said bitter waters.

5. That by reason of the great care exercised by him in the business of obtaining, caring for and bottling said waters and selling the same in the market, and the valuable properties of said waters, said business soon increased and additional territory was thereafter acquired by said Andreas Saxlehner, in which new wells, all giving forth the same water, were opened by him, all being situated near said first-mentioned well, and in a valley surrounded by considerable hills, the geographical name of which valley and territory contained in it is Örsöd, and thereupon said Andreas Saxlehner applied said name of "Hunyadi Janos" to the bottled waters of all said springs sold by him in the market.

6. That at or about the time when said Andreas Saxlehner adopted said name of "Hunyadi Janos," as aforesaid, he also adopted a characteristic and novel style of bottles in which said water
33 was sold by him in the market, the same being of a straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos Budai Keserûviz" (meaning Hunyadi Janos bitter water of Buda), together with a portrait supposed to be the portrait of the mediæval Hungarian hero Hunyadi Janos stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which label were a division of the same into three longitudinal fields, the middle field bearing said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of said label, the color of the middle field being red. That thence hitherto said natural mineral waters bottled and sold by said Andreas Saxlehner, in Hungary, and other European countries and in all the markets of the world have been known and called by said name and trade-mark of "Hunyadi Janos" water. That the said name "Hunyadi Janos" is in no way descriptive of the nature or

quality of the water of the said well or wells, but was adopted by the said proprietor as a fancy or ideal name, and as a trade-mark to distinguish the water of his said wells in commerce from all other waters.

7. That soon after said business of bottling and exporting said Hunyadi Janos water had been commenced by said Andreas Saxlehner in the year 1863, said water, named, bottled and labeled as aforesaid, became popular and was exported to and sold in all the principal countries of Europe and also the United States of America. That in the countries inhabited by the Latin races the word "Janos" became the common appellation of said water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name "Hunyadi" became the common appellation thereof, it being known as "Hunyadi water."

That in the month of March, 1876, said Andreas Saxlehner
34 executed a contract to a corporation known as the "Appollinaris Company, Limited," of London, by which he granted to said company the exclusive right to sell his said natural "Hunyadi Janos" bitter water in Great Britain, its colonies and possessions and the United States of America, and other transmarine countries for the term of ten years; which contract was thereafter further extended and terminated on the 25th day of March, 1896.

8. That about the time when said contract was entered into a label was designed to be used on the bottles of such water which were to be sold through said "Apollinaris Company, Limited," of substantially the same contents and characteristic parts as the label theretofore used, but of a different color, the body of the label being of blue color, while the red color of the central field was substantially retained. That the name "Hunyadi Janos," together with the historical portrait and the name of "Andreas Saxlehner," were retained on said label in the same manner as before, as was also the division into three longitudinal fields; and the general style of the bottles, as also the capsule and imprint thereon above described, remained the same. That said label was substantially like the label used by your orator, the successor of Andreas Saxlehner in said business as hereinafter referred to. That soon thereafter there was added to said blue and red label a small narrow strip on the top thereof in the same blue color containing the printed words "Sole exporters: The Apollinaris Company, Limited, London," which strip has been since retained, the reading of the print being thereafter changed to: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

9. That ever since the adoption of said blue and red label as aforesaid in or about the year 1876, large quantities of such bitter water thus bottled and labeled were exported by the said Andreas Saxlehner through said Apollinaris Company, Limited, to
35 the United States of America, and there sold to the public, and said water became known in the United States of America under the name of "Hunyadi water" and became known under the name as the property of said Andreas Saxlehner, and was ordered and sold under such name, the same being an abbreviation of the

name "Hunyadi Janos." That a large traffic and business in exporting to the United States and vending therein said water was established and continuously carried on and is now carried on by your orator as successor in business of said Andreas Saxlehner.

10. That on May 24, 1889, said Andreas Saxlehner died, and your orator, his widow, thereupon succeeded him in said business of bottling and exporting said Hunyadi Janos water and became and is the proprietor thereof.

11. That since the termination of said contract with said Apollinaris Company, Limited, your orator has continued said business of shipping to the United States and selling therein said Hunyadi Janos water, commonly known as Hunyadi water, in bottles and with labels and capsules thereon substantially as hereinbefore last described, excepting that upon said labels the statement is contained "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary," in place of an indication of the Apollinaris Company as exporters. That your orator is the sole proprietor of the firm of Andreas Saxlehner and lawfully doing business in Austria-Hungary, under said firm name.

12. That on or about the 12th day of November, 1886, said Andreas Saxlehner duly made application to the United States Patent Office, according to the statute of the United States therefor provided, for registration of the name "Hunyadi" as his trade-mark for natural aperient waters, and such proceedings were there-
36 after had, that on or about the 5th day of April, 1887, a certificate of registration of said trade-mark "Hunyadi" was duly issued to him by said United States Patent Office, dated on said last-mentioned day and numbered 14252, to which certificate or a certified copy thereof ready in court to be produced your orator refers for greater certainty.

13. That by reason of said sales by your orator and her predecessor in business and his and your orator's agents as aforesaid, the said word "Hunyadi" upon said label by her used and her predecessor as aforesaid, dealers in mineral waters and the purchasers and consumers of said water generally have come to know and have long known your orator's mineral water under the names and trademarks "Hunyadi" or "Hunyadi Janos," and under the said label and in the style of bottles, capsules and labels as before described, and that the water so furnished and sold by your orator in said United States is procured directly from the well or wells aforesaid, and therefore to rely upon the said label and trade-mark as an assurance and guarantee of the genuineness, strength and purity of the said water, and your orator alleges that said assurance and guarantee was and is of great value to your orator and to the dealers and consumers of said water. And that said water so sold by your orator has come generally to be known and designated by the trade so called, and by purchasers and consumers of the water in the United States of America, by the first and characteristic word of said trade-mark, "Hunyadi," the "Janos" being comparatively seldom used in common parlance in this country.

14. And your orator further shows unto your honors that the de-

fendant above named, well knowing the premises and the rights existing in and secured to your orator as aforesaid, but contriving to injure your orator and to deprive her of the benefits and advantages which might and otherwise would accrue unto her
37 from the enjoyment of such rights and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsules by your orator and her predecessor, recently and before the commencement of the suit, as your orator is informed and believes, in the city of New York and elsewhere, without license or allowance and against the will of your orator, in violation of the rights of your orator and infringing the said trade-mark, did unlawfully and wrongfully sell and offer for sale bitter water not coming from your orator's said wells in bottles of identical shape and size as those used by your orator and with certain capsules thereon stamped with the name or trade-mark "Hunyadi" of your orator or an imitation thereof calculated to deceive the public, and with labels on said bottles being made in such close and fraudulent imitation of your orator's said labels as to deceive the purchasers and consumers of your orator's water to confound the same with that sold by said defendant, said labels also bearing a fraudulent imitation of your orator's trade-mark "Hunyadi."

15. And your orator further shows that the similarity between the said bottles, capsules, labels and names used respectively by your orator and the defendant is so great, that the public and consumers and purchasers are likely to be deceived thereby and are in fact deceived to suppose the water so sold by the said defendant to be that sold by your orator and thereby to cause your orator great loss and damage.

16. That, as your orator is informed and believes, the defendant's said waters come from springs in Hungary, the proprietors of which are forbidden by law in Hungary from using the name "Hunyadi" upon the bottled waters thereof.

That your orator has duly notified said defendant of her rights and claims in the premises and requested it to desist from such further sales, but said defendant has refused and still refuses so to do.

38 19. That the value of the matter in dispute between your orator and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

20. That by reason of the said acts done or threatened and intended to be done by said defendant, all in defiance of the rights of your orator, as aforesaid, great and irreparable loss and injury has been, is and will be caused to your orator, and she has been and is and will be deprived of great gains, profits and advantages which might and otherwise would be obtained and enjoyed; and your orator is informed and believes that the said defendant, by reason of the said sales of the said water under the name of Hunyadi, and the said labels, capsule and bottle has made and realized large profits and advantages, and now has in its possession, or under its control or subject to its order, a large quantity of said water so

bottled, capsuled and labeled which it proposes to sell, but to what extent said sales have been made and how large profits have been derived therefrom your orator does not know and prays a discovery thereof. And your orator further says that such sales made by the said defendant and the threats and intention of defendant to make such further sales and said unlawful acts in disregard and defiance of the rights of your orator have the effect to and do encourage and induce others to interfere with the said trade-mark and label, and to violate and disregard your orator's rights.

And forasmuch as your orator can have no adequate relief except in this court, to the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may, according to its officers' best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as
39 if severally and separately interrogated as to each and every of such matters, and may be compelled to account for and pay to your orator the profits by it acquired and the damages suffered by your orator from the aforesaid unlawful acts. But an answer under oath is hereby expressly waived.

Your orator prays that the said defendant, its servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and permanently by the order and injunction of this honorable court from procuring, parting with, selling or attempting to sell within the United States of America any water or liquid not coming from the said wells of your orator under the name or designation Hunyadi, or any name or designation in which the word "Hunyadi" occurs, and also from procuring, parting with, selling or attempting to sell within the said limits any such water in any bottle or vessel imitating or resembling in form, color and general appearance those used as aforesaid by your orator and her predecessor in business, or bearing upon it any capsule stamped in any manner imitating or resembling the said capsules of your orator, or any label in form, color, design and general appearance imitating or resembling the said label of your orator on the said bottles of Hunyadi Janos water, and also from procuring, parting with *with* or selling or attempting to sell within said limits any such water put up or contained in bottles resembling and bearing capsules, marks and labels resembling those of your orator or bearing the name "Hunyadi."

And your orator also prays that the defendant may be decreed to deliver up unto your orator any and all labels in its possession upon which the words "Hunyadi" or "Hunyady" appear, or which are made in imitation of or resembling those adopted and used by your orator, and any and all bottles, whether filled or unfilled, and all capsules which imitate or resemble the bottles and capsules used by your orator for said "Hunyadi Janos" water, and to pay
40 unto your orator all profits derived by the said defendant from the sale of any water under the said name "Hunyadi," or any name or designation in which the word "Hunyadi" appears,

or any vessel upon which was or is affixed the label or capsules resembling those adopted and used as aforesaid by your orator, as well as the costs of this suit; and that your orator may have such further relief or such other or different relief as to this honorable court shall seem meet and as shall be agreeable to equity.

May it please your honors to grant unto your orator the writ of injunction, as well provisional as permanent, issuing out of and under the seal of this honorable court, commanding, enjoining and restraining the said defendant, its servants, agents, attorneys and workmen, and each and every of them as is hereinbefore and in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out and under the seal of this honorable court directed to the said defendant, Siegel, Cooper Company, by a certain day and under a certain penalty to be and appear in this honorable court, there and then to answer the premises, and to stand to and abide such order and decree as may be made against it.

And your orator will ever pray, &c.

BRIESEN & KNAUTH,
Complainant's Solicitors.

ANTONIO KNAUTH, *Of Counsel.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 12th day of April, 1897, before me personally appeared Antonio Knauth, one of the complainant's solicitors, who being by me duly sworn, deposes and says: That he has read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to these matters he believes it to be true, and that the reason why this affidavit is not made by the complainant is that she is a non-resident of the State of New York, and is at present not in the United States.

41

ANTONIO KNAUTH.

Subscribed and sworn to before me April 12, 1897.

HARRY M. TURK,
Notary Public, N. Y. County.

[SEAL.]

Replication (in usual form) to defendant's answer to the bill of complaint was filed August 2, 1897.

42 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
against
SIEGEL, COOPER COMPANY, Defendant. } In Equity.

The Answer of The Siegel, Cooper Company, the Defendant, to the Bill of Complaint of the said Complainant.

This defendant, now and at all times hereinafter saving and reserving to itself all benefits and advantages of exception which can or may be had to the many errors, uncertainties and other imperfections in the complainant's bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant answering on information and belief, says:

1st. This defendant admits the allegations set forth and contained in the 1st, 2d and 3d sections of the bill of complaint herein.

2d. This defendant further answering alleges, that it has no knowledge or information save and except as stated in the bill of complaint herein, with regard to the allegations contained in
43 the 4th, 5th, 6th and 7th sections of the bill of complaint herein (except with regard to that portion of the 7th section of said bill of complaint, relating to the contract executed in the month of March, 1876, between Andreas Saxlehner and the Apollinaris Company, Limited, of London, the allegations of which said 7th section in regard to said contract and the extension and termination thereof, this defendant hereby admits) and therefore denies the same and puts the complainant herein to make such proof thereof as she is advised is material and necessary.

3d. And this defendant further answering alleges, that it has no knowledge or information save and except from the bill of complaint, as to the allegations contained in the 8th, 10th, 11th and 12th sections thereof, and therefore denies the same, and puts complainant to the proof thereof, and to make such proof thereof as she may be advised is material and necessary.

4th. And this defendant further answering denies the allegations contained in the 9th, 13th, 14th, 15th, 19th and 20th sections of the bill of complaint herein.

5th. And this defendant further answering alleges, that it has no knowledge or information save and except from the bill of complaint herein, as to the allegations contained in the 16th section of said bill, and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary, and further alleges that the allegations of said 16th section of said bill are immaterial and irrelevant to the issues of this suit in view of the facts and circumstances hereinafter set forth.

6th. And this defendant further answering alleges, that in the year 1873, one Ignatius Markus was the proprietor of a certain well

or spring situated in the city limits of the city of Buda'
44 which city has for about twenty-five years last past been and
is now united with the city of Pest under the name of Budapest, in the Kingdom of Hungary, the waters of which well or spring possessed valuable medicinal properties, and in the year 1873 requested the proper official to be allowed to call the said spring Hunyady Matyas mineral spring or Hunyady Matyas spring, and the waters thereof which were being bottled and sold by him or about to be bottled or sold by him, "Hunyady Matyas," and also requested the proper authority for leave to register said title "Hunyady Matyas" as a designation or denomination of said spring or well and of the waters thereof.

That said request and claim of said Ignatius Markus for said leave to call his said spring or well and the waters thereof "Hunyady Matyas," and to register the same under the then Hungarian trade-mark law, was contested by Andreas Saxlehner, the proprietor of the Hunyadi Janos spring, on the grounds that the said title "Hunyady Matyas" interfered with the title "Hunyadi Janos," and further that the waters of said "Hunyady Matyas" were not of good or valuable medicinal effect or quality.

And this defendant further answering alleges, that the decision of the said official, before whom this controversy first came, was favorable to the said Andreas Saxlehner, and adverse to the claim of said Ignatius Markus, and by said decision the right of the said Ignatius Markus to call his spring by the said title or designation was denied.

And this defendant further answering alleges, that thereupon said Ignatius Markus appealed from the said decision to the royal Hungarian ministry of agriculture and commerce, the tribunal of last resort in such matters, and on such appeal said ministry, after considering the evidence on both sides, reversed the decision of the lower tribunal and decided in favor of said Ignatius Markus and
against said Andreas Saxlehner, deciding in favor of said
45 Markus on both issues, namely, that the names or designations "Hunyadi Janos" and "Hunyady Matyas" represented two quite decidedly distinguished titles, and also, that the said "Hunyady Matyas" spring and the waters thereof contained valuable medicinal qualities equally good in their elements, qualities and effects with those of the "Hunyadi Janos" waters, and thereupon granted the request of said Ignatius Markus to register the name or title "Hunyady Matyas" as a denomination and designation of the waters of his said spring or well.

7th. And this defendant further answering alleges, that thereafter the said Ignatius Markus continued to bottle and sell the waters of his said spring by and under the name of "Hunyady Matyas" for several years thereafter, when the said spring and the good will thereof was sold and disposed of for a valuable consideration by said Markus to one Heinrich Mattoni, who thereupon in accordance with the requirements of the then Hungarian trade-mark law registered in the proper office the title "Hunyady Matyas" as a denomination or designation of said spring, and as the successor to the same

of the said Ignatius Markus, and this without any claim or interference on the part of Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring.

8th. And this defendant further answering alleges, that the word "Hunyadi Janos" or anglicized "John Hunyadi" was so named or called by Andreas Saxlehner after a celebrated Hungarian hero of that name. That the surname "Hunyadi" is a common one in Hungary and means of or from Hunyad. And that such name by reason of its being a common one in Hungary is in and of itself incapable of exclusive appropriation by any one, being a common descriptive personal name, and also being used to designate certain districts
46 and towns in Hungary, and has been so used as a common descriptive name in various ways in Hungary for very many years, and was so used in the year 1889, at the time when the Eisner & Mendelson Company hereinafter referred to, became the sole lessee of the said "Hunyady Matyas" spring as hereinafter set forth.

9th. And this defendant further answering alleges, that in the year 1889, the word "Hunyadi" or "Hunyady" in and of itself and used by itself had become a generic term describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary, and that in addition to the "Hunyady Matyas," several of such wells had been registered under the Hungarian trade-mark law, the products of such wells being distinguished from each other by the word with which the said "Hunyadi" or "Hunyady" was associated. That among such wells other than the "Hunyady Matyas," the most prominent were the "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo," and that as this defendant is informed and believes, in or about the year 1878, Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring had endeavored to stop by legal proceedings the sale of the said "Hunyadi Laszlo" water under that name, but was defeated in such legal proceedings, and the sale of such "Hunyadi Laszlo" water allowed by and under the name or designation "Hunyadi Laszlo," and by and under its label, and that before the year 1889, Andreas Saxlehner had abandoned all claim or right to the exclusive use or appropriation of the word "Hunyadi" or "Hunyady" in and of itself as applied to his bitter water, and had acquiesced in the use of the said word by the various proprietors of "Hunyadi" springs in Hungary to designate their springs by and under said generic term, and in the distinguishing of their specific Hunyadi spring from his own "Hunyadi Janos" spring by the different specific designations "Hunyady Matyas," "Hunyadi Arpad,"
47 "Hunyadi Bela," etc., and had specifically acquiesced in and acknowledged the use of said word as a generic term by himself registering the words "Hunyadi Corvin" and "Hunyadi Erzebet" as titles or designations of bitter-water mineral springs of which he was the proprietor, under the Hungarian trade-mark law.

10th. And this defendant further answering alleges that in the year 1889, at the times when the Eisner & Mendelson Company hereinafter referred to, acquired the sole right to sell in the United States the waters of the "Hunyady Matyas" spring and became the

sole lessee thereof, as hereinafter set forth, the label of the "Hunyadi Janos" water as set forth in the bill of complaint was composed of three parts, or a threefold division, consisting of a central red panel with two wings, such central red panel having as its most prominent and distinctive feature, a medallion showing the picture of a knight or Hungarian hero, and had been for many years the common mode of labeling the said "Hunyadi" bitter waters before referred to, to the knowledge and with the acquiescence of said Andreas Saxlehner, such labels being distinguished from his "Hunyadi Janos" label by their specific details, but having as their common characteristic, and as their common mode of labelling, the threefold division into three parts with the center red panel and two wings, and with a medallion head on the front of said red panel, and that particularly and especially at the time that Ignatius Markus had had his controversy in 1873, with said Andreas Saxlehner with reference to the registration under the then Hungarian trade-mark law of his said title "Hunyady Matyas" as a designation of his said bitter-water spring. He (Markus) had then used said mode of labelling, namely, the threefold division label with a centered panel and two wings, the same, however, being distinguished from the "Hunyadi Janos" and the other "Hunyadi" waters by
48 its specific details, and that thereafter he and his aforesaid successor Heinrich Mattoni, had used the said label in connection with the words "Hunyady Matyas" to designate the "Hunyady Matyas" bitter water, and had so used the same until the year 1889, and had registered the same as required under the Hungarian trade-mark law in connection with the words "Hunyady Matyas" to designate and distinguish the "Hunyady Matyas" bitter water, and the said label was being so used at the time in 1889, when the Eisner & Mendelson Company became as hereinafter set forth, the lessees of the said "Hunyady Matyas" spring.

10th. And this defendant further answering alleges, that the allegation in the bill of complaint that Andreas Saxlehner adopted a characteristic and novel style of bottle for containing his "Hunyadi Janos" water when he adopted such name for his water, is not true, but that the shape shape of said "Hunyadi" bottles was common to the trade, and that a number of mineral waters were at the time he so adopted the name "Hunyadi Janos" put up for sale and sold in Hungary in bottles of a similar shape, and that bottles of a similar shape had been for years prior to 1889, used for putting up different mineral waters in Hungary, and that such bottles were common at that time to the mineral trade in Hungary and we known so to be by the said Andreas Saxlehner, and especially and particularly it was known to him that since 1873 continuously down to the year 1889 and in that year, "Hunyady Matyas" water had been continuously put for sale and sold in Hungary in bottles of the same shape, and of similar shape to that alleged in the bill of complaint herein as being the "Hunyadi Janos" characteristic and novel style of bottle, and that said Andreas Saxlehner had never up to that time asserted and made any claim to the exclusive use or appropriation

of said syle of bottle, and had acquiesced in the use of the
49 bottle in which the "Hunyady Matyas" water had as aforesaid been put up for sale and sold in Hungary, and that said Andreas Saxlehner had never during said period asserted or claimed any exclusive right to the capsule employed by him as set forth in the bill of complaint for his "Hunyadi Janos" water, but that the said capsule had been well known to and employed by the trade in Hungary for Hungarian mineral water and was a common and well-known trade capsule incapable of exclusive appropriation by any one, and its use as such common trade capsule for mineral waters, had long prior to the year 1889, been known to, recognized and acquiesced in by the said Andreas Saxlehner.

11th. This defendant further answering alleges, that in or about the year 1886, "Hunyadi Arpad" bitter water commenced to be imported into the United States by the proprietor of the "Hunyadi Arpad" spring or well at Budapest, Hungary or through his American agents, the said "Hunyadi Arpad" being put up for sale and sold in like bottles and in like capsules to those in which the same had been sold in Hungary, and which bottles and capsules were similar to those of the "Hunyadi Janos" waters then imported into the United States by the Appollinaris Company, to which company Andreas Saxlehner had given by contract the exclusive right to sell said "Hunyadi Janos" water in the United States, and to which bottles and capsules the complainant herein now claims the exclusive right as the claimed successor of said Andreas Saxlehner.

And this defendant further answering alleges, that the labels affixed to said bottles of "Hunyadi Arpad" water consisted of a threefold division and were divided into three parts, composed of a center red panel with two blue wings, and having a medallion head on the front of said red panel, and had printed on said label with words "Hunyadi Arpad" designating said water.

50 12th. And this defendant further answering alleges, that in or about the year 1887, Heinrich Mattoni, who was then the proprietor of the "Hunyady Matyas" spring at Budapest, Hungary, commenced to import into this country, through an American agent the "Hunyady Matyas" water in like bottles and with like capsules and with like labels to the bottles, capsules and labels as those of the "Hunyady Matyas" water of today, and which the complainant herein now claims to be an infringement upon her rights as claimed in the bill of complaint herein, with the exception of the Seal Brand label now affixed and for several years prior to this time affixed to the "Hunyady Matyas" bottles by the Eisner & Mendelson Company for the purpose of identification and distinguishment as hereinafter set forth.

13th. And this defendant further answering alleges, that about ten years ago, in or about the years 1886 and 1887, the Appollinaris Company, Limited, brought suits in the circuit court of the United States for the southern district of New York, against the American agents of said "Hunyady Arpad" and "Hunyady Matyas" waters, respectively, to prevent the use for any mineral water other than the "Hunyadi Janos," of any name of which the name "Hunyadi"

formed a part, and that temporary injunctions were obtained by said complainant, but that subsequently and in the year 1888, on motion of the defendants therein, said injunctions were dissolved with costs against the complainant on evidence that in Hungary where all the "Hunyadi" waters originated, the word "Hunyadi" was then actually and legally used and for a long time previously had been legally used as part of the names of a number or different mineral waters.

That prior to the time when such injunctions were dissolved and in ample time to take action, the said Appollinaris Company, Limited, notified its principal, Andreas Saxlehner, that such
51 motions to dissolve said injunctions had been made, and requested said Saxlehner to join with said company in opposing such motions for dissolution, and in maintaining and proceeding with said suits, and that said Andreas Sexlehner peremptorily refused to join with and aid or assist pecuniarily or otherwise the said Appollinaris Company in opposing the dissolution of said injunctions and in maintaining and proceeding with said suits, and that after such refusal on the part of said Andreas Saxlehner, and with full knowledge on his part, and his consent and acquiescence thereto, and with his full knowledge of all the facts and circumstances relating thereto, said injunctions were in the year 1888, dissolved, and said suits withdrawn and discontinued, and that thereafter the said "Hunyadi Arpad" and "Hunyady Matyas" waters were sold freely, openly and continuously and in competition with said "Hunyadi Janos" water, in the United States, in large quantities in the years 1888 and 1889, in the bottles and with the labels and capsules affixed thereto as hereinbefore set forth and by and under the names "Hunyadi Arpad" and "Hunyady Matyas," and with the knowledge, consent and acquiescence of said Andreas Saxlehner and his agents.

14th. And this defendant further answering alleges, that in the year 1889, the Eisner & Mendelson Company of Pennsylvania, was engaged in the business of importing and selling mineral waters and like articles throughout the United States, and that said corporation after a most careful investigation of all the facts and circumstances, and having ascertained the facts above set forth in relation to the history of the "Hunyady Matyas" spring in Hungary, and its use and sale in said country as above set forth, and its use and sale in the United States as above set forth, and relying on the premises above set forth in relation to the same, and the facts and circumstances above set forth in relation to the history,
52 use and sale of said "Hunyady Matyas" water in Hungary and the United States, entered into a contract with Heinrich Mattoni, the then proprietor of said "Hunyady Matyas" spring, wherein and whereby the said Eisner & Mendelson Company of Pennsylvania, for a valuable consideration became the sole and exclusive lessee of said spring for the term of twenty-five years, and acquired the sole and exclusive right to import said "Hunyady Matyas" water into the United States for said term, and to sell the same in the United States for the like term.

15th. And this defendant further answering alleges, that thereafter and since March 1, 1890, the said corporation commenced to sell the same as aforesaid lessee in the United States, by and under the name "Hunyady Matyas" in like bottles and with like capsules and labels affixed thereto as now claimed by the complainant herein to be in violation of her claimed rights as set forth in the bill of complaint herein, and which bottles, capsules and labels were similar to those in which the said "Hunyady Matyas" water had been first imported into and sold in the United States as aforesaid, in or about the year 1887, and similar to the labels, bottles and capsules in which the said "Hunyady Matyas" water had been sold in and under after the dissolution of the injunction aforesaid in the years 1888 and 1889, and that the said Eisner & Mendelson Company continued under said lease to import into the United States and sell in the United States said "Hunyady Matyas" water in like bottles and with like labels and capsules used therewith and affixed thereto until in or about the year 1892, when the Eisner & Mendelson Company of West Virginia was organized, and thereupon succeeded to all the rights, property, assets and contracts of its predecessor, the Eisner & Mendelson Company of Pennsylvania,
53 and thus became vested with the aforesaid contract of lease given by Heinrich Mattoni to said Pennsylvania corporation, and all the rights and privileges granted in said lease with reference to said "Hunyady Matyas" water, and that said Eisner & Mendelson Company of West Virginia, as successor of said Pennsylvania corporation has since the year 1892 and up to the present time, continuously and openly sold in the United States the "Hunyady Matyas" water imported by it under the terms of said lease, using the name or title "Hunyady Matyas" to designate the same, and importing and selling the said "Hunyady Matyas" water in like bottles and with capsules and labels affixed thereto similar to those used by its predecessor, the said Pennsylvania corporation, and with the knowledge, consent and acquiescence of the complainant herein and its exclusive sellers in the United States of "Hunyadi Janos" water the Apollinaris Company Limited.

16th. And this defendant further answering alleges, that soon after the said predecessor in business of said Eisner & Mendelson Company of West Virginia, commenced to sell the said "Hunyady Matyas" water in the United States under its said lease as aforesaid, it commenced to advertise the said "Hunyady Matyas" largely throughout the United States in trade journals and periodicals and in various other ways, in order to give the said water publicity and increase and extend the sale thereof, and that among other modes of advertising it sent to and distributed among all the large jobbers and dealers in mineral waters throughout the United States a card or slip showing on one side the "Hunyady Matyas" label in its threefold division and with its chocolate-brown panel in the center and with its two light-blue wings, and on the other side of said card a picture of the three principal springs at Budapest, showing their comparative location and designating the same as "Hunyadi Janos,"

"Hunyadi Arpad" and "Hunyady Matyas," and also setting
54 forth a comparative analysis of the waters of said three springs, and that thereupon and after said cards had been so sent and distributed, the American agent of the Appolinaris Company, Limited, called upon the said Eisner & Mendelson Company of Pennsylvania, at its New York office, in the city of New York, and stated that he had no objection to the label of the "Hunyadi Matyas" spring as used by the said Pennsylvania corporation, nor to the way in which the said corporation had advertised and was advertising said "Hunyady Matyas" water by and under the name of "Hunyady Matyas," with the exception of the analysis of the "Hunyadi Janos" spring as given in detail on the back of said advertising card or slip as aforesaid, but that he objected to such an analysis as unfair to the "Hunyadi Janos" water, because it was an old and out-of-date analysis of the "Hunyadi Janos" water, and that thereupon and after said objection of said agent, the said Pennsylvania corporation, the predecessor of the Eisner & Mendelson Company of West Virginia, at once discontinued the use of and distribution of said analysis on said advertising card or slip, and that thereafter the Appollinaris Company made no objection to the use by the said Pennsylvania corporation and its successor, of the words "Hunyadi Matyas," to designate the waters sold by said corporation under the aforesaid "Hunyadi Matyas" lease, nor to said advertising card or slip as corrected, nor to its "Hunyadi Matyas" bottles, capsules and labels, but with full knowledge of all the facts and circumstances consented and acquiesced in the use of the same, and that the above facts and circumstances above detailed constitute an estoppel upon the complainant herein in this suit.

17th. And this defendant further answering, alleges, that in the year 1889, in addition to becoming the lessee of the "Hunyady Matyas" water as above set forth and detailed, the Eisner & Mendelson Company of Pennsylvania the predecessor of its suc-
55 cessor in business as above set forth, relying upon the facts and circumstances above detailed in relation to the history of the "Hunyadi Arpad" spring, and relying upon the fact that in Hungary the word "Hunyadi" or "Hunyady," had in and of itself become a generic term, became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela" waters, and at once commenced to sell the same in large quantities. That the said three waters were sold by and under said respective names, and by and under the generic term "Hunyadi," being distinguished from each other in the mineral-water trade of the United States, among druggists and dealers in mineral waters, and by the consumers and the public generally, and in writing, and speaking and ordering, by emphasizing the word "Arpad," "Laszlo" or "Bela," with which the generic word "Hunyadi" was associated, and which thus distinguished said waters as well as the "Hunyady Matyas" water from the "Hunyadi Janos" water, and that each of said waters "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" were put up for sale and sold in bottles similar to those of the "Hunyadi Janos," "Hunyady Matyas" and the "Hunyadi

Arpad" bottles as above set forth and with like capsules and with labels consisting of a threefold division into three parts, composed of a red central label and two blue wings, said central having a medallion picture on its front, and being distinguished from the "Hunyadi Janos" labels by specific details, and by the respective names "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo." That the said Eisner & Mendelson Company, Pennsylvania corporation, continued to sell the said "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" waters from the time in 1889 when said corporation became the American agent for said waters during the years 1889, 1890 and 1891, in large quantities and in open competition with the "Hunyadi Janos" water
56 up to the time in 1892, when said corporation was succeeded in business as aforesaid by the Eisner & Mendelson Company of West Virginia, who continued to sell the said waters in like manner and in open competition with the said "Hunyadi Janos" water and in large quantities until some time in the year 1893, when the present complainant stopped said competi-on so far as regards the "Hunyadi Arpad" and "Hunyadi Bela" water by purchasing the said springs from their proprietor in Hungary, and thereupon revoked the agency of said company to sell said waters, and ceased to import the same in any way into the United States, and that thereafter said Eisner & Mendelson Company continued to sell the "Hunyadi Laszlo" water in open competition as aforesaid with the "Hunyadi Janos" water, until some time in the year 1895, when it ceased to import the same.

18th. That by reason of the facts and circumstances above set forth, the word "Hunyadi" had at the time of the commencement of this suit and had for many years previously been a generic term to designate the above-referred-to "Hunyadi" waters, and also a number of other "Hunyadi" waters, imported and sold in the United States of which "Hunyadis" including those above set forth, some eleven have been imported and sold in the United States during the last ten years, whereby the word "Hunyadi" has become a generic term designating a class of bitter aperient waters imported from Hungary, and that said term "Hunyadi" has so become such generic term in the United States, has been repeatedly and publicly and widely admitted by the Appollinaris Company in its advertisements, actions, conduct and in various and many ways during the last ten years, and that the bottles, capsules and labels in which said "Hunyadis" have been put up for sale and under which they have been sold in the United States have become in their general style, coloring and mode of printing, common to said "Hunyadis,"
57 has been repeatedly, publicly and widely recognized and acquiesced in during the last ten years throughout the United States by repeated statements, acts and conduct of Andreas Saxlehner and his authorized agents in the United States during the last ten years.

19th. And for a further and separate defense, and as a specific act showing that said Andreas Saxlehner never claimed or asserted any right to the word "Hunyadi" as a trade-mark in and of itself and

as dissociated and as discoupled from the word "Janos," but based his right to a trade-mark to the words "Hunyadi Janos" together and as a word symbol, this defendant alleges that on August 31st, 1877, said Andreas Saxlehner applied to the Commissioner of Patents for the registration of the word symbol "Hunyadi Janos" as a United States trade-mark, in which said application, he stated the essential part of the trade-mark which he had adopted for use in the United States consisted of the word symbol "Hunyadi Janos," and that the said trade-mark for said word symbol was registered September 11th, 1877, as No. 5144, by which proceeding he abandoned all claim of right and all assertion of right to the word "Hunyadi," in and of itself.

20th. And this defendant further answering alleges, that the Eisner & Mendelson Company of West Virginia in order to give itself further and additional protection in the use of the words "Hunyady Matyas" to designate the "Hunyady Matyas" water sold by it in the United States, and in and to the essential parts of its "Hunyady Matyas" label used as aforesaid, by itself and its said predecessor in business, on or about July 21st, 1893, applied to the Commissioner of Patents of the United States for a trade-mark for the same, in the statement of which application for said trade-mark, said company stated that said trade-mark had been used continuously in its business since March 1st, 1890, in accordance with
58 the facts relating to its use as above set forth, and that thereafter said trade-mark was registered on August 22d, 1893, as No. 23520, as by a reference to said trade-mark or a certified copy thereof here in court to be produced will more fully and at large appear, and that since the registration of said trade-mark, that said company has used the said trade-mark as stated therein and in accordance therewith and under the protection of said registration.

21st. And this defendant further answering alleges, that in the year 1893, in order to further differentiate and distinguish the "Hunyady Matyas" water sold by said company in the United States as aforesaid, from the "Hunyadi Janos" water, and the other "Hunyadi" waters then in the market, and to associate the said "Hunyady Matyas" water with the Eisner & Mendelson Company of West Virginia as its seller in the United States, said company adopted and commenced to use as a seller's label an additional label affixed to and made a conspicuous and prominent part of the "Hunyady Matyas" label theretofore used by said company and its predecessors in business, showing the representation of a red seal on a white background and with the word- "Seal brand" on said label to designate the same, and thereafter commenced to advertise throughout the country in various ways the said "Hunyady Matyas" water sold by said company as "Hunyady Matyas Seal brand," advertising the same as sold by the Eisner & Mendelson Company, and that by reason of the efforts made and money spent by said company in so advertising the said "Hunyady Matyas" water as "Hunyady Matyas Seal brand" or "Seal brand" and by its use of said "Seal Brand" label, the said water during the last four years, has been and was at the time of the commencement of this

suit known among the mineral-water trade and persons dealing in mineral water, and by the public and consumers generally as
59 "Hunyady Matyas Seal brand" or "Seal brand" or "Hunyady Seal brand," and by these names has become identified and associated with the said Eisner & Mendelson Company as the sellers of said "Hunyady Matyas" water, and during the last four years, has been ordered from and known by the trade generally under said names.

22d. And this defendant further answering denies each and every other allegation in the bill of complaint herein, not hereinbefore admitted or denied.

23d. And this defendant further answering says, that the complainant is not entitled to an injunction or an account of profits or any other relief against this defendant as prayed for in the bill of complaint, without this that any other matter, cause or thing in the said bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

SIEGEL COOPER COMPANY,
By B. J. GREENHUT, *Sec'y.*
CHARLES G. COE,
Solicitor for Defendant.

60 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Benedict J. Greenhut, being duly sworn says that he is the secretary of The Siegel Cooper Company, the defendant corporation herein. That he has read the foregoing answer subscribed by him and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BENEDICT J. GREENHUT.

Sworn to before me this 12th day of July, 1897.

CHARLES WAHLER,
Notary Public, N. Y. Co.

[SEAL.]

61 Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
RUDOLPH GIES, Defendant.
} In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Emilie Saxlehner brings this bill of complaint against Rudolph Gies, and thereupon your orator complains and says:

1. That your orator is the widow of Andreas Saxlehner, deceased, and resides at the city of Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary.

2. That the defendant, the said Rudolph Gies, is a resident and a citizen of the State of New York, residing in the city of New York.

3. That said Andreas Saxlehner, late of the city of Budapest, in the Kingdom of Hungary, was at all the times herein
62 mentioned, until the 24th day of May, 1889, the proprietor of a certain well situated at Örsöd, within the city limits of the city of Buda (otherwise known in the German language as the city of Ofen), which city has for about twenty-five years last past been and is now united with the city of Pest under the name of Budapest, in said Kingdom of Hungary, the waters of which well possess valuable medicinal properities.

4. That in or about the year 1863 said Andreas Saxlehner commenced to bottle the waters of said well and to sell the same in the market, and for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market adopted the arbitrary and fanciful name or trade-mark of "Hunyadi Janos" for his said bitter waters.

5. That by reason of the great care exercised by him in the business of obtaining, caring for and bottling said waters and selling the same in the market, and the valuable properties of said water, said business soon increased and additional territory was thereafter acquired by said Andreas Saxlehner in which new wells, all giving forth the same water, were opened by him, all being situated near said first-mentioned well, and in a valley surrounded by considerable hills, the geographical name of which valley and territory contained in it is Örsöd, and thereupon said Andreas Saxlehner applied said name of "Hunyadi Janos" to the bottled water of all said springs sold by him in the market.

6. That at or about the time when said Andreas Saxlehner adopted said name of "Hunyadi Janos" as aforesaid, he also adopted a characteristic and novel style of bottles in which said water was sold by him in the market, the same being of a straight shape with a short neck, to the top of which was attached a
63 metal capsule bearing the inscription "Hunyadi Janos Budai Keserûviz" (meaning Hunyadi Janos bitter water of Buda) together with a portrait supposed to be the portrait of the mediæval Hungarian hero Hunyadi Janos stamped therein, and a novel and

peculiar label covering almost the whole body of the bottle, the characteristic features of which label were a division of the same into three longitudinal fields, the middle field bearing said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of said label, the color of the middle field being red. That thence hitherto said natural mineral waters bottled and sold by said Andreas Saxlehner in Hungary and other European countries and in all the markets of the world have been known and called by said name and trade-mark of "Hunyadi Janos" water. That the said name "Hunyadi Janos" is in no way descriptive of the nature or quality of the water of the said well or wells, but was adopted by the said proprietor as a fancy or ideal name and as a trade-mark to distinguish the water of his said wells in commerce from all other waters.

7. That soon after said business of bottling and exporting said Hunyadi Janos water had been commenced by said Andreas Saxlehner in the year 1863, said water, named, bottled and labeled as aforesaid, became popular and was exported to and sold in all the principal countries of Europe and also the United States of America. That in the countries inhabited by the Latin races the word "Janos" became the common appellation of said water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name "Hunyadi" became the common appellation thereof, it being known as "Hunyadi water." That in the month of March, 1876, said Andreas Sexlehner executed a contract to a corporation known as the "Apollinaris Company, Limited," of London, by which he granted to said company the
64 exclusive right to sell his said natural "Hunyadi Janos" bitter water in Great Britain, its colonies and possessions, and the United States of America, and other transmarine countries for the term of ten years; which contract was thereafter further extended and terminated on the 25th day of March, 1896.

8. That about the time when said contract was entered into a label was designed to be used on the bottles of such water which were to be sold through said "Apollinaris Company, Limited" of substantially the same contents and characteristic parts as the label theretofore used, but of a different color, the body of the label being of blue color, while the red color of the central field was substantially retained. That the name "Hunyadi Janos" together with the historical portrait and the name of "Andreas Saxlehner" were retained on said label in the same manner as before, as was also the division into three longitudinal fields; and the general style of the bottles, as also the capsule and imprint thereon above described remained the same. That said label was substantially like the label used by your orator, the successor of Andreas Saxlehner in said business as hereinafter referred to. That soon thereafter there was added to said blue and red label a small narrow strip on the top thereof in the same blue color containing the printed words "Sole exporters: The Apollinaris Company, Limited, London," which strip has been since retained, the reading of the print being thereafter changed to: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

9. That ever since the adoption of said blue and red label as aforesaid, in or obout the year 1876, large quantities of such bitter water thus bottled and labeled were exported by the said Andreas Saxlehner through said Apollinaris Company, Limited, to the
65 United States of America, and there sold to the public, and said water became known in the United States of America under the name of "Hunyadi water," and became known under the name as the property of said Andreas Saxlehner, and was ordered and sold under such name, the same being an abbreviation of the name "Hunyadi Janos." That a large traffic and business in exporting to the United States and vending therein said water was established and continuously carried on, and is now carried on by your orator as successor in business of said Andreas Saxlehner.

10. That on May 24, 1889, said Andreas Saxlehner died, and your orator, his widow, thereupon succeeded him in said business of bottling and exporting said Hunyadi Janos water, and became and is the proprietor thereof.

11. That since the termination of said contract with said Apollinaris Company, Limited, your orator has continued said business of shipping to the United States and selling therein said Hunyadi Janos water, commonly known as Hunyadi water, in bottles and with labels and capsules thereon substantially as hereinbefore last described, excepting that upon said labels the statement is contained, "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary," in place of an indication of the Apollinaris Company as exporters. That your orator is the sole proprietor of the firm of Andreas Saxlehner and lawfully doing business in Austria-Hungary under said firm name.

12. That on or about the 12th day of November, 1886, said Andreas Saxlehner duly made application to the United States Patent Office, according to the statute of the United States therefor provided, for registration of the name "Hunyadi" as his trade-mark for natural aperient waters, and such proceedings were thereafter had, that on or about the 5th day of April, 1887, a certificate
66 of registration of said trade-mark "Hunyadi" was duly issued to him by said United States Patent Office, dated on said last-mentioned day and numbered 14252, to which certificate, or a certified copy thereof ready in court to be produced, your orator refers for greater certainty.

13. That by reason of said sales by your orator and her predecessor in business, and his and your orator's agents as aforesaid, the said word "Hunyadi" upon said label by her used and her predecessor as aforesaid, dealers in mineral waters and the purchasers and consumers of said water generally have come to know and have long known your orator's mineral water under the names and trade-marks "Hunyadi" or "Hunyadi Janos," and under the said label and in the style of bottles, capsules and labels as before described, and that the water so furnished and sold by your orator in said United States is procured directly from the well or wells aforesaid, and therefore to rely upon the said label and trade-mark as an assurance and guarantee of the genuineness, strength and purity of

the said water, and your orator alleges that said assurance and guarantee was and is of great value to your orator and to the dealers and consumers of said water. And that said water so sold by your orator has become generally to be known, and designated by the trade so called, and by purchasers and consumers of the water in the United States of America by the first and characteristic word of said trade-mark "Hunyadi," the "Janos" being comparatively seldom used in common parlance in this country.

14. And your orator further shows unto your honors that the defendant above named, well knowing the premises and the rights existing in and secured to your orator as aforesaid, *by* contriving to injure your orator and to deprive her of the benefits and ad-
67 vantages which might and otherwise would accrue unto her from the enjoyment of such rights and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsules by your orator and her predecessor, recently and before the commencement of the suit, as your orator is informed and believes, in the city of New York and elsewhere, without license or allowance and against the will of your orator, in violation of the rights of your orator and infringing the said trade-mark, did unlawfully and wrongfully sell and offer for sale bitter water not coming from your orator's said wells, in bottles of identical shape and size as those used by your orator, and with certain capsules thereon stamped with the name "Hunyady Matyas" and at other times with the portrait of a king, all in close and fraudulent imitation of your orator's capsule aforesaid, and with labels on said bottles bearing the name "Hunyady Matyas," and a portrait in the middle field of said label, set in a medallion, all in close and fraudulent simulation of your orator's trade-mark; and that defendant's said labels also further imitate your orator's label by being divided into three longitudinal fields covering almost the whole body of the bottle, the color of the middle field being red or reddish and that of the body of the label being blue or bluish, and in many other particulars, all contrived to induce the public to take defendant's water as and in place of your orator's water. That even the additional strips of blue paper on top of your orator's label as aforesaid is imitated closely in defendant's said labels, which further contain the untrue statement that "the metal capsules are stamped with the picture of King Stephen of Hungaria," while in fact said capsules do not all contain such stamp, but some of them bear instead the fraudulent inscription "Hunyady Matyas seal brand" in imitation of your orator's trade-mark.

15. And your orator further shows that the similarity be-
68 tween the said bottles, capsules, labels and names used respectively by your orator and the defendant is so great, that the public and consumers and purchasers are likely to be deceived thereby, and are in fact deceived to suppose the water so sold by the said defendant to be that sold by your orator and thereby to cause your orator great loss and damage.

16. That until the year 1890 your orator and her said predecessor in business did not enjoy adequate protection in Hungary in the

use of her and his trade-marks, trade names and labels on account of the lack of statutes regulating such matters, by reason of which fact other persons used the name Hunyadi in connection with other names as trade-marks for other bitter waters, and closely imitated your orator's labels, capsules and bottles, and your orator's predecessor was unable to stop such fraudulent practices; that since the year 1890 the law of Hungary has been changed, and your orator has succeeded in causing all these fraudulent marks and labels to be suppressed by proper proceedings brought for this purpose, including also the use of the name "Hunyady Matyas," and the labels upon which said names were used by the proprietors of the springs from which said defendant's waters came; and that the further use of said names is now a criminal offense in Hungary.

That your orator has duly notified said defendant of her rights and claims in the premises and requested him to desist from such further sales, but said defendant has refused and still refuses so to do.

19. That the value of the matter in dispute between your orator and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

20. That by reason of the said acts done or threatened and intended to be done by said defendant, all in defiance of the rights of your orator as aforesaid, great and irreparable loss and injury
69 has been, is and will be caused to your orator, and she has been and is and will be deprived of great gains, profits and advantages which might and otherwise would be obtained and enjoyed; and your orator is informed and believes that the said defendant, by reason of the said sales of the said water under the name of "Hunyady Matyas" and the said label, capsule and bottle, has made and realized large profits and advantages, and now has in his possession, or under his control, or subject to his order, a large quantity of said water so bottled, capsuled and labeled which he proposes to sell, but to what extent said sales have been made and how large profits have been derived therefrom your orator does not know and prays a discovery thereof. And your orator further says that such sales made by the said defendant, and the threats and intention of defendant to make such further sales and said unlawful acts in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to interfere with the said trade-mark and label and to violate and disregard your orator's rights.

And forasmuch as your orator can have no adequate relief except in this court, to the end, therefore, that the said defendant, may, if he can, show why your orator should not have the relief hereby prayed, and may, according to his best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of such matters, and may be compelled to account for and pay to your orator the profits by him acquired and the damages suffered by

your orator from the aforesaid unlawful acts. But an answer under oath is hereby expressly waived.

Your orator prays that the said defendant, his servants,
70 agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and permanently by the order and injunction of this honorable court from procuring, parting with, selling or attempting to sell within the United States of America any water or liquid not coming from the said wells of your orator under the name or designation "Hunyady Matyas" or any name or designation in which the word "Hunyadi" occurs, and also from procuring, parting with, selling or attempting to sell within the said limits any such water in any bottle or vessel imitating or resembling in form, color and general appearance those used as aforesaid by your orator and her predecessor in business, or bearing upon it any capsule stamped in any manner imitating or resembling the said capsules of your orator or any label in form, color, design and general appearance imitating or resembling the said label of your orator on the said bottles of Hunyadi Janos water, and also from procuring, parting with or selling or attempting to sell within said limits any such water put up or contained in bottles resembling and bearing capsules, marks and labels resembling those of your orator or bearing the name "Hunyadi."

And your orator also prays that the defendant may be decreed to deliver up unto your orator or to this honorable court any and all labels in his possession upon which the words "Hunyadi" or "Hunyady Matyas" appear, or which are made in imitation of or resembling those adopted and used by your orator, and any and all bottles, whether filled or unfilled, and all capsules which imitate or resemble the bottles and capsules used by your orator for said "Hunyadi Janos" water, and to pay unto your orator all profits derived by the said defendant from the sale of any water under the said name "Hunyady Matyas" or any name or designation in which the word "Hunyadi" appears, or any vessel upon which was or is affixed the label or capsules resembling those adopted and
71 used as aforesaid by your orator, as well as the costs of this suit; and that your orator may have such further relief or such other or different relief as to this honorable court shall seem meet, and as shall be agreeable to equity.

May it please your honors to grant unto your orator the writ of injunction, as well provisional as permanent, issuing out of and under the seal of this honorable court, commanding, enjoining and restraining the said defendant, his servants, agents, attorneys and workmen, and each and every of them as is hereinbefore and in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendant Rudolph Gies by a certain day and under a certain penalty to be and appear in this honorable court,

there and then to answer the premises and to stand to and abide such order and decree as may be made against him.

And your orator will ever pray, &c.

BRIESEN & KNAUTH,
Complainant's Solicitors.
ANTONIO KNAUTH, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, City and County of New York, }

Kálmán Saxlehner, being duly sworn, deposes and says: That he resides in the city of New York; that he is the resident agent in the United States of the complainant in the above entitled suit; that he has read the foregoing bill of complainant and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated on information and belief, and that as to those he believes it to be true; that the reason why this affidavit
72 is not made by the complainant is that she is not within the United States, but is in the Kingdom of Hungary.

KÁLMÁN SAXLEHNER.

Sworn to before me this 14th day of May, 1897.

MAURICE BLOCK,
[SEAL.] *Notary Public, N. Y. Co.*

Replication in usual form to the defendant's answer to the bills of complaint was filed August 2, 1897.

73 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
against
RUDOLPH GIES, Defendant. } In Equity.

The Answer of Rudolph Gies, the Defendant, to the Bill of Complaint of the said Complainant.

This defendant, now and at all times hereinafter saving and reserving to himself all benefits and advantages of exception which or can or may be had to the many errors, uncertainties and other imperfections of the complainant's bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant answering says:

1st. This defendant admits the allegations set forth and contained in the first, second and third sections of the bill of complaint herein.

2d. This defendant further answering alleges that it has no knowledge or information save and except as stated in the bill of complaint herein, with regard to the allegations contained in the fourth, fifth, sixth and seventh sections of the bill of complaint herein
74 (except with regard to that portion of the seventh section of said bill of complaint relating to the contract executed in the

month of March, 1876, between Andreas Saxlehner and the Appollinaris Company, Limited, of London, the allegations of which said seventh section in regard to said contract and the extension and termination thereof, this defendant hereby admits), and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary.

3d. And this defendant further answering alleges that he has no knowledge or information save and except from the bill of complaint as to the allegations contained in the eighth, tenth, eleventh and twelfth sections thereof, and therefore denies the same and puts complainant to the proof thereof, and to make such proof thereof as she may be advised is material and necessary.

4th. And this defendant further answering denies the allegations contained in the ninth, thirteenth, fourteenth, fifteenth, nineteenth, and twentieth sections of the bill of complaint herein.

5th. And this defendant further answering alleges that he has no knowledge or information save and except from the bill of complaint herein as to the allegations contained in the sixteenth section of said bill, and therefore denies the same and puts the complainant herein to make such proof thereof as she is advised is material and necessary, and further alleges that the allegations of said sixteenth section of said bill are material and irrelevant to the issues of this suit in view of the facts and circumstances hereinafter set forth.

6th. And this defendant further answering alleges that in the year 1873, one Ignatius Markus was the proprietor of a certain well or spring situated within the city limits of the city of Buda, which city has for about twenty-five years past and is now united with
75 the city of Pest under the name of Budapest, in the Kingdom of Hungary, the waters of which well or spring possessed valuable medicinal properties, and in the year 1873 requested the proper official to call the said spring "Hunyady Matyas mineral spring," or "Hunyady Matyas spring," and the waters thereof which were being bottled and sold by him or about to be bottled and sold by him, "Hunyady Matyas," and also requested the proper authority for leave to register said title "Hunyady Matyas" as a designation or denomination of said spring or well and of the waters thereof.

That said request and claim of said Ignatius Markus for said leave to call his said spring or well and the waters thereof "Hunyady Matyas" and to register the same under the then Hungarian trade-mark law, was contested by Andreas Saxlehner, the proprietor of the Hunyadi Janos spring, on the grounds that the said title "Hunyady Matyas" interfered with the title "Hunyadi Janos," and further that the waters of said "Hunyady Matyas" spring were not of good or valuable medicinal effect.

And this defendant further answering alleges that the decision of the said official before whom this controversy first came was favorable to the said Andreas Saxlehner and adverse to the claim of said Ignatius Markus, and by said decision the right of the said Ignatius Markus to call his spring by the said title or designation was denied.

And this defendant further answering alleges, that thereupon said

Ignatius Markus appealed from said decision to the royal Hungarian ministry of agriculture and commerce, the tribunal of last resort in such matters, and on such appeal, said ministry after considering the evidence on both sides, reversed the decision of the lower tribunal and decided in favor of the said Ignatius Markus and against said Andreas Saxlehner, deciding in favor of said Markus on both issues, namely, that the names or designations "Hunyadi Janos" and "Hunyady Matyas" represented two quite de-
76 cidedly distinguished titles, and also, that the said "Hunyadi Matyas" spring and waters thereof contained valuable medicinal qualities equally good in their elements, qualities and effects with those of the "Hunyady Janos" waters, and thereupon granted the request of said Ignatius Markus to register the name or title "Hunyady Matyas" as a denomination and designation of the waters of his said spring or well.

7th. And this defendant further answering alleges, that thereafter the said Ignatius Markus continued to bottle and sell the waters of his said spring by and under the name of "Hunyady Matyas" for several years thereafter, when the said spring and the good will thereof was sold and disposed of for a valuable consideration by said Markus to one Heinrich Mattoni, who thereupon in accordance with the requirements of the then Hungarian trade-mark law registered in the proper office the title "Hunyady Matyas" as a denomination or designation of said spring, and as the successor to the same of the said Ignatius Markus, and this without any claim of interference on the part of Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring.

8th. And this defendant further answering alleges that the word "Hunyadi Janos" or anglicized "John Hunyadi" was so named or called by Andreas Saxlehner after a celebrated Hungarian hero of that name. That the surname "Hunyadi" is a common one in Hungary and means of or from Hunyad. And that such name by reason of its being a common one in Hungary, is in and of itself incapable of exclusive appropriation by any one, being a common descriptive personal name and also being used to designate certain districts and towns in Hungary, and has been so used as a common descriptive name in various ways in Hungary for very many
77 years, and was so used in the year 1889, at the time when the Eisner & Mendelson Company hereinafter referred to, became the sole lessee of the said "Hunyady Matyas" spring as hereinafter set forth.

And this defendant further answering alleges that in the year 1889, the word "Hunyadi" or "Hunyady" in and of itself used by itself had become a generic term describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary, and that in addition to the "Hunyady Matyas," several of such wells had been registered under the Hungarian trade-mark law, the products of such wells being distinguished from each other by the word, with which the said "Hunyadi" or "Hunyady" was associated. That among such wells other than the "Hunyady Matyas," the most prominent were the "Hunyadi Arpad," "Hun-

yadi Bela" and "Hunyadi Laszlo" and that as this defendant is informed and believes, in or about the year 1878, Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring had endeavored to stop by legal proceedings, the sale of said "Hunyadi Laszlo" water under that name, but was defeated in such legal proceedings, and the sale of such "Hunyadi Laszlo" water allowed by and under the name or designation "Hunyadi Laszlo" and by and under its label, and that before the year 1889, Andreas Saxlehner had abandoned all claim or right to the exclusive use or appropriation of the word "Hunyadi" or "Hunyady" in and of itself as applied to his bitter water, and had acquiesced in the use of the said word by the various proprietors of "Hunyadi" springs in Hungary to designate their springs by and under said generic term and in the distinguishing of their specific "Hunyadi" spring from his own "Hunyadi Janos" spring by the different specific designations "Hunyady Matyas," "Hunyadi Arpad," "Hunyadi Bela," etc., and had specifically acquiesced in and acknowledged the use of said word as a generic term by himself registering the words
78 "Hunyadi Corvin" and "Hunyadi Erzebet" as titles or designations of bitter-water mineral springs of which he was the proprietor, under the then Hungarian trade-mark law.

10th. And this defendant further answering alleges, that in the year 1889, at the time when the Eisner & Mendelson Company acquired the sole right to sell in the United States, the waters of the "Hunyady Matyas" spring and became the sole lessee thereof, as hereinafter set forth, the label of the "Hunyadi Janos" water as set forth in the bill of complaint was composed of three parts, or a threefold division, consisting of a certain red panel with two wings, central red panel having as its most prominent and distinctive feature, a medallion showing the picture of a knight or Hungarian hero, and had been for many years the common mode of labelling the said "Hunyadi" bitter waters before referred to, to the knowledge and with the acquiescence of said Andreas Saxlehner, such labels being distinguished from his "Hunyadi Janos" label by their specific details, but having as their common characteristic, and as their common mode of labelling the threefold division into three parts with the center red panel and two wings, and with a medallion head on the front of said red panel, and that particularly and especially at the time that Ignatius Markus had had his controversy in 1873, with said Andreas Saxlehner, with reference to the registration under the then Hungarian trade-mark law of his said title "Hunyady Matyas" as a designation of his said bitter-water spring, he (Markus) had then used said mode of labelling, namely, the threefold-division label with a center red panel and two wings, the same, however, being distinguished from the "Hunyadi Janos" and the other "Hunyadi" waters by its specific details, and that thereafter he and his aforesaid successor Heinrich Mattoni, had used the said label in connection with the words "Hunyady Matyas"
79 to designate the "Hunyady Matyas" bitter water, and had so used the same until the year 1889, and had registered the same as required under the Hungarian trade-mark law in connec-

tion with the words "Hunyady Matyas" to designate and distinguish the "Hunyady Matyas" bitter water, and the said label was being so used at the time in 1889, when the Eisner and Mendelson Company became as hereinafter set forth, the lessee of the said "Hunyady Matyas" spring.

10. And this defendant further answering alleges, that the allegation in the bill of complaint that Andreas Saxlehner adopted a characteristic and novel style of bottle for containing his "Hunyadi Janos" water when he adopted such name for his water, is not true, but that the shape of said "Hunyadi" bottles was common to the trade, and that a number of mineral waters were at the time he so adopted the name "Hunyadi Janos" put up for sale and sold in Hungary in bottles of a similar shape, and that bottles of a similar shape had been for years prior to 1889, used for putting up different mineral waters in Hungary, and that such bottles were common at that time to the mineral-water trade in Hungary and were known so to be by the said Andreas Saxlehner, and especially and particularly it was known to him that since 1873 continuously down to the year 1889 and in that year, "Hunyady Matyas" water had been continuously put up for sale and sold in Hungary in bottles of the same shape, and of a similar shape to that alleged in the bill of complaint herein as being the "Hunyadi Janos" characteristic and novel style of bottle, and that said Andreas Saxlehner had never up to that time asserted and made any claim to the exclusive use or appropriation of said style of bottle, and had acquiesced in the use of the bottle in which the "Hunyady Matyas" water had as aforesaid been put up for sale and sold in Hungary, and that said Andreas Saxlehner had never during said period asserted or claimed any exclusive right to the capsule employed by him as set forth in the bill of complaint for his "Hunyadi Janos" water, but that the said capsule had been well known to and employed by the trade in Hungary for Hungarian mineral waters, and was a common and well-known trade capsule incapable of exclusive appropriation by any one, and its use as such common trade capsule for mineral waters, had long prior to the year 1889, been known to, recognized and acquiesced in by the said Andreas Saxlehner.

11th. This defendant further answering alleges, that in or about the year 1886, "Hunyadi Arpad" bitter water commenced to be imported into the United States by the proprietor of the "Hunyadi Arpad" spring or well at Budapest, Hungary, or through his American agents, the said "Hunyadi Arpad" water being put up for sale and sold in like bottles and in like capsules to those in which the same had been sold in Hungary, and which bottles and capsules were similar to those of the "Hunyadi Janos" waters then imported into the United States by the Apollinaris Company, to which company Andreas Saxlehner had given by contract the exclusive right to sell said "Hunyadi Janos" water in the United States, and to which bottles and capsules the complainant herein now claims the exclusive right as the claimed successor of said Andreas Saxlehner.

And this defendant further answering alleges, that the labels affixed to said bottles of "Hunyadi Arpad" water consisted of a

threefold division and were divided into three parts, composed of a center red panel with two blue wings, and having a medallion head on the front of said red panel, and had printed on said label the words "Hunyadi Arpad" designating said water.

12th. And this defendant further answering alleges, that in or about the year 1887, Heinrich Mattoni, who was then the
81 proprietor of the "Hunyady Matyas" spring at Budapest, Hungary, commenced to import into this country through an American agent the "Hunyady Matyas" water in like bottles and with like capsules and with like labels to the bottles, capsules and labels as those of the "Hunyady Matyas" water of today, and which the complainant herein now claims to be an infringement upon her rights as claimed in the bill of complaint herein, with the exception of the Seal Brand label now affixed and for several years prior to this time affixed to the "Hunyady Matyas" bottles by the Eisner & Mendelson Company for the purpose of identification and distinguishment as hereinafter set forth.

13th. And this defendant further answering alleges, that about ten years ago, in or about the years 1886 and 1887, the Apollinaris Company, Limited, brought suits in the circuit court of the United States for the southern district of New York, against the American agents of said "Hunyadi Arpad" and "Hunyady Matyas" waters, respectively, to prevent the use for any mineral water other than the "Hunyadi Janos" of any name of which the name "Hunyadi" formed a part, and that temporary injunctions were obtained by said complainant, but that subsequently and in the year 1888, on motion of the defendants therein, said injunctions were dissolved with costs against the complainant on evidence that in Hungary where all the "Hunyadi" waters originated, the word "Hunyadi" was then actually and legally used and for a long time previously had been legally used as part of the names of a number of different mineral waters.

That prior to the time when such motions were dissolved and in ample time to take action, the said Appollinaris Company, Limited, notified its principal, Andreas Saxlehner, that such motions to dis-
solve said injunctions had been made, and requested said
82 Saxlehner to join with said company in opposing such motions for dissolution, and in maintaining and proceeding with said suits, and that said Andreas Saxlehner peremptorily refused to join with and aid or assist pecuniarily or otherwise the said Appollinaris Company in opposing the dissolution of said injunctions and in maintaining and proceeding with said suits, and that after such refusal on the part of said Andreas Saxlehner, and with full knowledge on his part, and his consent and acquiescence thereto, and with his full knowledge of all the facts and circumstances relating thereto, said injunctions, were in the year 1888, dissolved, and said suits withdrawn and discontinued, and that thereafter the said "Hunyadi Arpad" and "Hunyady Matyas" waters were sold freely, openly and continuously and in competition with said "Hunyadi Janos" water, in the United States, in large quantities in the years 1888 and 1889, in the bottles and with the labels and capsules affixed

thereto as hereinbefore set forth and by and under the names "Hunyadi Arpad" and "Hunyady Matyas," and with the knowledge, consent and acquiescence of said Andreas Saxlehner and his agents.

14th. And this defendant further answering alleges, that in the year 1889, the Eisner & Mendelson Company of Pennsylvania, was engaged in the business of importing and selling mineral waters and like articles throughout the United States, and that said corporation after a most careful investigation of all the facts and circumstances, and having ascertained the facts above set forth in relation to the history of the "Hunyady Matyas" spring in Hungary, and its use and sale in said country as above set forth, and its use and sale in the United States, as above set forth, and relying on the premises above set forth in relation to the same, and the facts and circumstances above set forth in relation to the history, use and sale of said "Hunyady Matyas" water in Hungary and the United
83 States, entered into a contract with Heinrich Mattoni, the then proprietor of said "Hunyady Matyas" spring, wherein and whereby the said Eisner & Mendelson Company of Pennsylvania, for a valuable consideration became the sole and exclusive lessee of said spring for the term of twenty-five years, and acquired the sole and exclusive right to import said "Hunyady Matyas" water into the United States for said term, and to sell the same in the United States for the like term.

15th. And this defendant further answering alleges, that thereafter and since March 1st, 1890, the said corporation commenced to sell the same as aforesaid lessee in the United States, by and under the name "Hunyady Matyas" in like bottles and with like capsules and labels affixed thereto as now claimed by the complainant herein to be in violation of her claimed rights as set forth in the bill of complaint herein, and which bottles, capsules and labels were similar to those in which the said "Hunyady Matyas" water had been first imported into and sold in the United States as aforesaid, in or about the year 1887, and similar to the labels, bottles and capsules in which the said "Hunyady Matyas" water had been sold in and under and after the dissolution of the injunctions aforesaid in the years 1888 and 1889, and that the said Eisner & Mendelson Company continued under said lease to import into the United States and sell in the United States said "Hunyady Matyas" water in like bottles and with like labels and capsules used herewith and affixed thereto until in or about the year 1892, when the Eisner & Mendelson Company of West Virginia was organized, and thereupon succeeded to all the rights, property, assets and contracts of its predecessor, the Eisner & Mendelson Company of Pennsylvania, and thus became vested with the aforesaid contract of lease given by Heinrich Mattoni to said Pennsylvania corporation, and all the rights
84 and privileges granted in said lease with reference to said "Hunyady Matyas" water, and that said Eisner & Mendelson Company of West Virginia as successor of said Pennsylvania corporation has since the year 1892, and up to the present time, continuously and openly sold in the United States the "Hunyady Matyas" water imported by it under the terms of said lease, using

the name or title "Hunyadi Matyas" to designate the same, and importing and selling the said "Hunyady Matyas" water in like bottles and with capsules and labels affixed thereto similar to those used by its predecessor, the Pennsylvania corporation, and with the knowledge, consent and acquiescence of the complainant herein and its exclusive sellers in the United States of "Hunyadi Janos" waters, the Apollinaris Company, Limited.

16th. And this defendant further answering alleges, that soon after the said predecessor in business of said Eisner & Mendelson Company of West Virginia, commenced to sell the said "Hunyadi Matyas" water in the United States under its said lease as aforesaid, it commenced to advertise the said "Hunyady Matyas" largely throughout the United States in trade journals and periodicals and in various other ways, in order to give the said water publicity and increase and extend the sale thereof, and that among other modes of advertising it sent to and distributed among all the jobbers and dealers in mineral waters throughout the United States a card or slip showing on one side the "Hunyadi Matyas" label in its three-fold division and with its chocolate-brown panel in the center and with its two light-blue wings, and on the other side of said card a picture of the three principal springs at Budapest, showing their comparative location and designating the same as "Hunyadi Janos," "Hunyadi Arpad" and "Hunyady Matyas," and also setting forth a comparative analysis of the waters of said three
85 springs, and that thereupon and after said cards had been so sent and distributed, the American agent of the Apollinaris Company, Limited, called upon the said Eisner & Mendelson Company of Pennsylvania, at its New York office in the city of New York, and stated that he had no objection to the label of the "Hunyady Matyas" spring as used by the said Pennsylvania corporation, nor to the way in which the said corporation had advertised and was advertising said "Hunyady Matyas" water by and under the name of "Hunyady Matyas" with the exception of the analysis of the "Hunyadi Janos" spring as given in detail on the back of said advertising card or slip as aforesaid, but that he objected to such an analysis as unfair to the "Hunyadi Janos" water, because it was an old and out-of-date analysis of the "Hunyadi Janos" water, and thereupon and after said objection of said agent, the said Pennsylvania corporation, the predecessor of the Eisner and Mendelson Company of West Virginia, at once discontinued the use of and distribution of said analysis on said advertising card or slip, and that thereafter the Apollinaris Company made no objection to the use by the said Pennsylvania corporation and its successor, of the words "Hunyady Matyas" to designate the waters sold by said corporation under the aforesaid "Hunyady Matyas" lease, not to said advertising card or slip as corrected, nor to its "Hunyady Matyas" bottles, capsules and labels, but with full knowledge of all the facts and circumstances, consented and acquiesced in the use of the same, and that the above facts and circumstances above detailed constitute an estoppel upon the complainant herein in this suit.

17th. And this defendant further answering alleges, that in the

year 1889, in addition to becoming the lessee of the "Hunyady Matyas" water as above set forth and detailed, the said Eisner & Mendelson Company of Pennsylvania, the predecessor of said
86 West Virginia corporation as above set forth, relying upon the facts and circumstances above detailed in relation to the history of the "Hunyadi Arpad" spring, and relying upon the fact that in Hungary the word "Hunyadi" or "Hunyady," had in and of itself become a generic term, became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela" waters, and at once commenced to sell the same in large quantities. That the said three waters were sold by and under said respective names, and by and under the generic terms "Hunyadi" being distinguished from each other in the mineral-water trade of the United States, among druggists and dealers in mineral waters, and by consumers and the public generally, and in writing, and speaking, and ordering by emphasizing the word "Arpad," "Laszlo" or "Bela" with which the generic word "Hunyadi" was associated, and which thus distinguished said waters as well as the "Hunyady Matyas" water from the "Hunyady Janos" water, and that each of said waters "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" were put up for sale and sold in bottles similar to those of the "Hunyadi Janos" "Hunyadi Matyas" and the "Hunyadi Arpad" bottles as above set forth, and with like capsules and with labels consisting of a threefold division into three parts composed of a red central label and two blue wings, said center label having a medallion picture on its front, and being distinguished from the "Hunyadi Janos" labels by specific details, and by the respective names "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo." That the said Eisner & Mendelson Company, Pennsylvania corporation, continued to sell the said "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" waters from the time in 1889 when said corporation became the American agent for said waters, during the years 1889, 1890 and 1891, in large quantities and in open competition with the "Hunyadi Janos"
87 water, up to the time in 1892, when said corporation was succeeded in business as aforesaid by the Eisner & Mendelson Company of West Virginia, who continued to sell the said waters in like manner and in open competition with the said "Hunyadi Janos" water and in large quantities until some time in the year 1893, when the present complainant stopped said competition so far as regard the "Hunyadi Arpad," and "Hunyadi Bela," water by purchasing the said springs from their proprietor in Hungary, and thereupon revoked the agency of said company to sell said waters, and ceased to import the same in any way into the United States, and that thereafter said Eisner & Mendelson Company continued to sell the "Hunyadi Laszlo" water in open competition as aforesaid with the "Hunyadi Janos" water until some time in the year 1895, when it ceased to import the same.

18. That by reason of the facts and circumstances above set forth the word "Hunyadi" had at the time of the commencement of thi

suit and had for many years previously been a generic term to designate the above-referred-to "Hunyadi" waters, and also a number of other "Hunyadi" waters imported and sold in the United States, of which "Hunyadies" including those above set forth, some eleven have been imported and sold in the United States during the last ten years, whereby the word "Hunyadi" has become a generic term designating a class of bitter aperient waters imported from Hungary, and that said term "Hunyadi" has so become such generic term in the United States, has been repeatedly and publicly and widely admitted by the Apollinaris Company in its advertisements, actions, conduct, and in various and many ways during the last ten years, and that the bottles, capsules and labels, in which said "Hunyadis" have been put up for sale and under which they have been sold in the United States have become in their
88 general style, coloring and mode of printing, common to said "Hunyadis," has been repeatedly, publicly and widely recognized and acquiesced in during the last ten years throughout the United States by repeated statements, acts and conduct of Andreas Saxlehner and his authorized agents in the United States during the last ten years.

19th. And for a further and separate defense, and as a specific act showing that said Andreas Saxlehner never claimed or asserted any right to the word "Hunyadi" as a trade-mark in and of itself and as dissociated and as discoupled from the word "Janos," but based his right to a trade-mark to the words "Hunyadi Janos" together and as a word symbol, this defendant alleges, that on August 31st, 1877, said Andreas Saxlehner applied to the Commissioner of Patents for the registration of the word symbol "Hunyadi Janos" as a United States trade-mark, in which said application he stated the essential part of the trade-mark which he had adopted for use in the United States consisted of the word symbol "Hunyadi Janos," and that the said trade-mark for said word symbol was registered September 11th, 1877, as No. 5144, by which proceeding he abandoned all claim of right and all assertion of right to the word "Hunyadi" in and of itself.

20th. And this defendant further answering alleges, that the Eisner & Mendelson Company of West Virginia in order to give itself further and additional protection in the use of the words "Hunyady Matyas" to designate the "Hunyady Matyas" water sold by it in the United States, and in and to the essential parts of its "Hunyady Matyas" label used as aforesaid, by itself and its said predecessor in business, on or about July 21st, 1893, applied to the Commissioner of Patents of the United States for a trade-mark for the same, in the statement of which application for said trade-mark,
said company stated that said trade-mark had been used
89 continuously in its business since March 1st, 1890, in accordance with the facts relating to its use as above set forth, and that thereafter said trade-mark was registered on August 22d, 1893, as No. 23520, as by a reference to said trade-mark or a certified copy thereof here in court to be produced will more fully and at large appear, and that since the registration of said trade-mark the

said company has used the said trade-mark as stated therein and in accordance therewith and under the protection of said registration.

21st. And this defendant further answering alleges, that in the year 1893, in order to further differentiate and distinguish the "Hunyadi Matyas" water sold by this defendant in the United States as aforesaid, from the "Hunyady Janos" water, and the other "Hunyadi" waters then in the market, to associate the said "Hunyady Matyas" water with the Eisner & Mendelson Company of West Virginia as its seller in the United States, said company adopted and commenced to use as a seller's label, an additional label affixed to and made a conspicuous and prominent part of the "Hunyady Matyas" label theretofore used by said company and its predecessor in business, showing the representation of a red seal on a white background and with the word- "Seal brand" on said label to designate the same, and thereafter commenced to advertise throughout the country in various ways the said "Hunyady Matyas" water sold by said company as "Hunyady Matyas Seal brand," advertising the same as sold by the Eisner & Mendelson Company, and that by reason of the efforts made and money spent by said company in so advertising the said "Hunyady Matyas" water as "Hunyady Matyas Seal brand" or "Seal brand" and by its use of said "Seal brand" label, the said water during the last four years has been and was at the time of the commencement of this suit, known among the mineral-water trade and persons dealing in mineral water,
90 and by the public and consumers generally as "Hunyady Matyas Seal brand" or "Seal brand" or "Hunyady Seal brand," and by these names has become identified and associated with the said Eisner & Mendelson Company as the sellers of said "Hunyady Matyas" water, and during the last four years has been ordered from and known by the trade generally under said names.

22nd. And this defendant further answering denies each and every other allegation in the bill of complaint herein not hereinbefore admitted or denied.

23d. And this defendant further answering says, that the complainant is not entitled to an injunction or an account of profits or any other relief against this defendant as prayed for in the bill of complaint, without this, that any other matter, cause or thing in the said bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided and denied is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and hereby prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

RUDOLPH GIES.

CHARLES S. COE,
Solicitor for Defendant.

91 & 92 SOUTHERN DISTRICT OF NEW YORK, *ss*:

Rudolph Gies, being duly sworn, says that he is the defendant herein, that he has read the foregoing answer by him subscribed and knows the contents thereof, that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

RUDOLPH GIES.

Sworn to before me this 12th day of July, 1897.

CHAS. WAHLUS,
Notary Public, N. Y. Co.

93 Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
LOUIS MARQUET, Defendant.
} In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Emilie Saxlehner brings this bill of complaint against Louis Marquet, and thereupon your orator complains and says:

1. That your orator is the widow of Andreas Saxlehner, deceased, and resides at the city of Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary.

2. That the defendant, the said Louis Marquet is a citizen of the State of New York.

3. That said Andreas Saxlehner, late of the city of Buda-
94 pest, in the Kingdom of Hungary, was at all the times herein mentioned, until the 24th day of May, 1889, the proprietor of a certain well situated at Örsöd, within the city limits of the city of Buda (otherwise known in the German language as the city of Ofen), which city has for about twenty-five years last past been and is now united with the city of Pest under the name of Budapest, in said Kingdom of Hungary, the waters of which well possess valuable medicinal properties.

4. That in or about the year 1863 said Andreas Saxlehner commenced to bottle the waters of said well and to sell the same in the market, and for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market adopted the arbitrary and fanciful name or trade-mark of "Hunyadi Janos" for his said bitter waters.

5. That by reason of the great care exercised by him in the business of obtaining, caring for and bottling said waters and selling the same in the market, and the valuable properties of said water, said business soon increased and additional territory was thereafter acquired by said Andreas Saxlehner in which new wells, all giving forth the same water, were opened by him, all being situated near said first-mentioned well, and in a valley surrounded by considerable hills, the geographical name of which valley and territory con-

tained in it is Örsöd, and thereupon said Andreas Saxlehner applied said name of "Hunyadi Janos" to the bottled water of all said springs sold by him in the market.

6. That at or about the time when said Andreas Saxlehner adopted said name of "Hunyadi Janos" as aforesaid, he also adopted a characteristic and novel style of bottles in which said water was sold by him in the market, the same being of a straight shape with a short neck, to the top of which was attached a
95 metal capsule bearing the inscription "Hunyadi Janos Budai Keserüviz" (meaning Hunyadi Janos bitter water of Buda), together with a portrait supposed to be the portrait of the mediæval Hungarian hero, Hunyadi Janos, stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which label were a division of the same into three longitudinal fields, the middle field bearing said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of said label, the color of the middle field being red. That thence hitherto said natural mineral waters, bottled and sold by said Andreas Saxlehner in Hungary and other European countries and in all the markets of the world, have been known and called by said name and trade-mark of "Hunyadi Janos" water. That the said name "Hunyadi Janos" is in no way descriptive of the nature or quality of the water of the said well or wells, but was adopted by the said proprietor as a fancy or ideal name and as a trade-mark to distinguish the water of his said wells in commerce from all other waters.

7. That soon after said business of bottling and exporting said Hunyadi Janos water had been commenced by said Andreas Saxlehner, in the year 1863, said water, named, bottled and labeled as aforesaid, became popular and was exported to and sold in all the principal countries of Europe and also the United States of America. That in the countries inhabited by the Latin races the word "Janos" became the common appellation of said water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name "Hunyadi" became the common appellation thereof, it being known as "Hunyadi water." That in the month of March, 1876, said Andreas Saxlehner executed a contract to a corporation known as the "Apollinaris Company,
96 Limited," of London, by which he granted to said company the exclusive right to sell his said natural "Hunyadi Janos" bitter water in Great Britain, its colonies and possessions and the United States of America, and other transmarine countries for the term of ten years; which contract was thereafter further extended, and terminated on the 25th day of March, 1896.

8. That about the time when said contract was entered into a label was designed to be used on the bottles of such water which were to be sold through said "Apollinaris Company, Limited," of substantially the same contents and characteristic parts as the label theretofore used, but of a different color, the body of the label being of blue color, while the red color of the central field was substantially retained. That the name "Hunyadi Janos," together

with the historical portrait and the name of "Andreas Saxlehner," were retained on said label in the same manner as before, as was also the division into three longitudinal fields; and the general style of the bottles, as also the capsule and imprint thereon above described remained the same. That said label was substantially like the label used by your orator, the successor of Andreas Saxlehner in said business, as hereinafter referred to. That soon thereafter there was added to said blue and red label a small, narrow strip on the top thereof in the same blue color containing the printed words, "Sole exporters: The Apollinaris Company, Limited, London," which strip has been since retained, the reading of the print being thereafter changed to: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

9. That ever since the adoption of said blue and red label as aforesaid in or about the year 1876, large quantities of such bitter water thus bottled and labeled were exported by the said Andreas Saxlehner through said Apollinaris Company, Limited, to
97 the United States of America, and there sold to the public, and said water became known in the United States of America under the name of "Hunyadi water," and became known under the name as the property of said Andreas Saxlehner, and was ordered and sold under such name, the same being an abbreviation of the name "Hunyadi Janos." That a large traffic and business in exporting to the United States and vending therein said water was established and continuously carried on and is now carried on by your orator as successor in business of said Andreas Saxlehner.

10. That on May 24, 1899, said Andreas Saxlehner died, and your orator, his widow, thereupon succeeded him in said business of bottling and exporting said Hunyadi Janos water, and became and is the proprietor thereof.

11. That since the termination of said contract with said Apollinaris Company, Limited, your orator has continued said business of shipping to the United States and selling therein said Hunyadi Janos water, commonly known as Hunyadi water, in bottles and with labels and capsules thereon substantially as hereinbefore last described, excepting that upon said labels the statement is contained: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary," in place of an indication of the Apollinaris Company as exporters. That your orator is the sole proprietor of the firm of Andreas Saxlehner, and lawfully doing business in Austria-Hungary under said firm name.

12. That on or about the 12th day of November, 1886, said Andreas Saxlehner duly made application to the United States Patent Office, according to the statute of the United States therefor provided, for registration of the name "Hunyadi" as his trade-mark for natural aperient waters, and such proceedings were thereafter had that on or about the 5th day of April, 1887, a certificate of
98 registration of said trade-mark "Hunyadi" was duly issued to him by said United States Patent Office, dated on said last-mentioned day and numbered 14252, to which certificate or a cer-

tified copy thereof ready in court to be produced your orator refers for greater certainty.

13. That by reason of said sales by your orator and her predecessor in business and his and your orator's agents as aforesaid, the said word "Hunyadi" upon said label by her used and her predecessor as aforesaid, dealers in mineral waters, and the purchasers and consumers of said water generally, have come to know and have long known your orator's mineral water under the names and trade-marks "Hunyadi" or "Hunyadi Janos," and under the said label and in the style of bottles, capsules and labels as before described, and that the water so furnished and sold by your orator in said United States is procured directly from the well or wells aforesaid, and therefore to rely upon the said label and trade-mark as an assurance and guarantee of the genuineness, strength and purity of the said water, and your orator alleges that said assurance and guarantee was and is of great value to your orator and to the dealers and consumers of said water; and that said water so sold by *by* your orator has come generally to be known and designated by the trade socalled, and by purchasers and consumers of the water in the United States of America by the first and characteristic word of said trade-mark "Hunyadi," the "Janos" being comparatively seldom used in common parlance in this country.

14. And your orator further shows unto your honors that the defendant above named, well knowing the premises and the rights existing in and secured to your orator, as aforesaid, but contriving to injure your orator, and to deprive her of the benefits and advantages which might and otherwise would
99 accrue unto her from the enjoyment of such rights and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsules by your orator and her predecessor, recently and before the commencement of the suit, as your orator is informed and believes, in the city of New York and elsewhere, without license or allowance and against the will of your orator, in violation of the rights of your orator and infringing the said trade-mark, did unlawfully and wrongfully offer for sale and sell bitter water not coming from your orator's said wells in bottles of identical shape and size as those used by your orator and with certain capsules thereon stamped with the name "Hunyady Matyas" in close and fraudulent imitation of your orator's capsule aforesaid and with labels on said bottles bearing the name "Hunyady Matyas" and a portrait in the middle field of said label, set in a medallion, all in close and fraudulent simulation of your orator's trade-mark; and that defendant's said labels further imitate the label of your orator by being divided into three longitudinal fields, covering almost the whole body of the bottle, the color of the middle field being red or reddish and that of the body of the label being blue or bluish and in many other particulars all contrived to induce the public to take defendant's water as and in place of plaintiff's water. That even the additional strip of blue paper on top of your orator's label, as aforesaid, is imitated closely in defendant's said labels, which further contain the untrue state-

ment that "the metal capsules are stamped with the picture of King Stephen of Hungaria," while in fact said capsules contain no such stamp, but in place thereof the fraudulent inscription "Hunyady Matyas Seal brand" in imitation of your orator's trade-mark.

15. And your orator further shows that the similarity between the said bottles, capsules, labels and names, used respectively by your orator and the defendant is so great, that the public and consumers and purchasers are likely to be deceived thereby and
100 are in fact deceived to suppose the water so sold by the said defendant to be that sold by your orator and thereby to cause your orator great loss and damage.

16. That until the year 1890 your orator and her said predecessor in business did not enjoy adequate protection in Hungary in the use of her and his trade-marks, trade names and labels on account of the lack of statutes regulating such matters, by reason of which fact other persons used the name Hunyadi in connection with other names as trade-marks for other bitter waters and closely imitated your orator's labels, capsules and bottles and your orator's predecessor was unable to stop such fraudulent practices; that since the year 1890 the law of Hungary has been changed and your orator has succeeded in causing all these fraudulent marks and labels to be suppressed by proper proceedings brought for this purpose, including also the use of the name "Hunyadi Matyas" and the labels upon which said names were used by the proprietors of the springs from which said defendant's waters came; and that the further use of said names is now a criminal offense in Hungary.

That your orator has duly notified said defendant of her rights and claims in the premises and requested to desist from such further sales, but said defendant has refused and still refuses so to do.

19. That the value of the matter in dispute between your orator and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

20. That by reason of the said acts done or threatened and intended to be done by said defendant, all in defiance of the rights of your orator as aforesaid, great and irreparable loss and injury has been, is and will be caused to your orator, and she has been and
101 is and will be deprived of great gains, profits and advantages, which might and otherwise would be obtained and enjoyed; and your orator is informed and believes that the said defendant by reason of the said sales of the said water under the name of Hunyady Matyas, and the said label, capsule and bottle has made and realized large profits and advantages and now has in his possession or under his control or subject to his order a large quantity of said water so bottled, capsuled and labeled, which he proposes to sell, but to what extent said sales have been made and how large profits have been derived therefrom your orator does not know and prays a discovery thereof. And your orator further says that such sales made by the said defendant and the threats and intention of defendant to make such further sales and said unlawful acts in disregard and defiance of the rights of your orator have the effect to

and do encourage and induce others to interfere with the said trademark and label and to violate and disregard your orator's rights.

And forasmuch as your orator can have no adequate relief, except in this court, to the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, according to his best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of such matters, and may be compelled to account for and pay to your orator the profits by him acquired and the damages suffered by your orator from the aforesaid unlawful acts. But an answer under oath is hereby expressly waived.

Your orator prays that the said defendant, his servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and permanently by the
102 order and injunction of this honorable court from procuring, parting with, selling or attempting to sell within the United States of America any water or liquid not coming from the said wells of your orator under the name or designation Hunyady Matyas or any name or designation in which the word "Hunyadi" occurs, and also from procuring, parting with, selling or attempting to sell within the said limits any such water in any bottle or vessel imitating or resembling in form, color and general appearance those used as aforesaid by your orator and her predecessor in business, or bearing upon it any capsule stamped in any manner imitating or resembling the said capsules of your orator or any label in form, color, design and general appearance imitating or resembling the said label of your orator on the said bottles of Hunyadi Janos water, and also from procuring, parting with or selling or attempting to sell within said limits any such water put up or contained in bottles resembling and bearing capsules, marks and label resembling those of your orator or bearing the name "Hunyadi."

And your orator also prays that the defendant may be decreed to deliver up unto your orator any and all labels in his possession upon which the words "Hunyadi" or "Hunyady Matyas" appear, or which are made in imitation of or resembling those adopted and used by your orator, and any and all bottles, whether filled or unfilled, and all capsules which imitate or resemble the bottles and capsules used by your orator for said "Hunyady Janos" water, and to pay unto your orator all profits derived by the said defendant from the sale of any water under the said name "Hunyadi Matyas" or any name or designation in which the word "Hunyadi" appears, or any vessel upon which was or is affixed the label or capsules resembling those adopted and used as aforesaid by
103 your orator, as well as the costs of this suit, and that your orator may have such further relief or such other or different relief as to this honorable court shall seem meet and shall be agreeable to equity.

May it please your honors to grant unto your orator the writ of

injunction, as well provisional as permanent, issuing out of and under the seal of this honorable court, commanding, enjoining and restraining the said defendant, his servants, agents, attorneys and workmen, and each and every of them as is hereinbefore and in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court directed to the said defendant, Louis Marquet, by a certain day and under a certain penalty to be and appear in this honorable court there and then to answer the premises and to stand to and abide such order and decree as may be made against him.

And your orator will ever pray, &c.

BRIESEN & KNAUTH,
Complainant's Solicitors.
ANTONIO KNAUTH, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, City and County of New York, }

Kálmán Saxlehner, being duly sworn, deposes and says: That he resides in the city of New York; that he is the resident agent in the United States of the complainant in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those he believes it to be true; that the reason why this affi-
104 davit is not made by the complainant is that she is not within the United States, but is in the Kingdom of Hungary.

KÁLMÁN SAXLEHNER.

Sworn to before me this 24th day of May, 1897.

MAURICE BLOCK,
Notary Public, N. Y. County.

Replication in usual form to the defendant's answer to the bill of complaint was filed August 2, 1897.

105 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
against
LOUIS MARQUET, Defendant. } In Equity.

The Answer of Louis Marquet, the Defendant, to the Bill of Complaint of the said Complainant.

This defendant, now and at all times hereinafter saving and reserving to himself all benefits and advantages of exception which, or can, or may be had to the many errors, uncertainties and other imperfections in the complainant's bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is, or are, material or necessary for him to make answer unto, this defendant answering, says:

1st. This defendant admits the allegations set forth and contained in the 1st, 2d and 3d sections of the bill of complaint herein.

2d. This defendant further answering, alleges: that it has no knowledge or information, save and except as stated in the bill of complaint herein with regard to the allegations contained in the 4th, 5th, 6th and 7th sections of the bill of complaint herein
106 (except with regard to that portion of the 7th section of said bill of complaint relating to the contract executed in the month of March, 1876, between Andreas Saxlehner and the Appollinaris Company, Limited, of London, the allegation of which said 7th section in regard to said contract, and the extension and termination thereof this defendant hereby admits), and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary.

3d. And this defendant further answering, alleges: that he has no knowledge or information, save and except from the bill of complaint, as to the allegations contained in the 8th, 10th, 11th and 12th sections thereof, and therefore denies the same, and puts complainant to the proof thereof, and to make such proof thereof as she may be advised is material and necessary.

4th. And this defendant further answering, denies the allegations contained in the 9th, 13th, 14th, 15th, 19th and 20th sections of the bill of complaint herein.

5th. And this defendant further answering, alleges: that he has no knowledge or information, save and except from the bill of complaint herein as to the allegations contained in the 16th section of said bill, and therefore denies the same, and puts the complainant herein to make such proof thereof as she is advised is material and necessary, and further alleges that the allegations of the said 16th section of said bill are material and irrelevant to the issues of this suit, in view of the facts and circumstances hereinafter set forth.

6th. And this defendant further answering, alleges: that in the year 1873, one Ignatius Markus was the proprietor of a certain well or spring, situated within the city limits of the city of Buda, which city has for about twenty-five years last past been, and is now, united with the city of Pest, under the name of Budapest, in the
107 Kingdom of Hungary, the waters of which well or spring possessed valuable medicinal properties, and in the year 1873, requested the proper official to be allowed to call the said spring "Hunyady Matyas mineral spring," or "Hunyady Matyas spring," and the waters thereof which were being bottled and sold by him, or about to be bottled or sold by him, "Hunyady Matyas," and also requested the proper authority for leave to register said title, "Hunyady Matyas," as a designation or denomination of said spring or well, and of the waters thereof.

The said request and claim of said Ignatius Markus for said leave to call his said spring or well and the waters thereof "Hunyady Matyas," and to register the same under the then Hungarian trade-mark law, was contested by Andreas Saxlehner, the proprietor of the Hunyadi Janos spring, on the grounds that the said title, "Hunyady Matyas," interfered with the title "Hunyadi Janos,"

and further, that the waters of said "Hunyady Matyas" spring were not of good or valuable medicinal effect.

And this defendant further answering, alleges: that the decision of the said official before whom this controversy first came was favorable to the said Andreas Saxlehner, and adverse to the claim of said Ignatius Markus, and by said decision the right of the said Ignatius Markus to call his spring by the said title or designation was denied.

And this defendant further answering alleges, that thereupon said Ignatius Markus appealed from said decision to the royal Hungarian ministry of agriculture and commerce, the tribunal of last resort in such matters, and on such appeal, said ministry after considering the evidence on both sides, reversed the decision of the lower tribunal and decided in favor of the said Ignatius Markus and against said Andreas Saxlehner, deciding in favor of said Markus on both issues, namely, that the names or designations "Hunyadi Janos" and "Hunyady Matyas" represented two quite
108 decidedly distinguished titles, and also that the said "Hunyady Matyas" spring and the waters thereof contained valuable medicinal qualities equally good in their elements, qualities and effects with those of the "Hunyadi Janos" waters, and thereupon granted the request of said Ignatius Markus to register the name or title "Hunyady Matyas" as a denomination and designation of the waters of his said spring or well.

7th. And this defendant further answering alleges, that thereafter the said Ignatius Markus continued to bottle and sell the waters of his said spring by and under the name of "Hunyady Matyas" for several years thereafter, when the said spring and the good will thereof was sold and disposed of for a valuable consideration by said Markus to one Heinrich Mattoni, who thereupon in accordance with the requirements of the then Hungarian trade-mark law registered in the proper office the title "Hunyady Matyas" as a denomination or designation of said spring, and as the successor to the same of the said Ignatius Markus, and this without any claim of interference on the part of Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring.

8th. And this defendant further answering alleges that the word-"Hunyadi Janos" or anglicised "John Hunyadi," was so named or called by Andreas Saxlehner after a celebrated Hungarian hero of that name. That the surname "Hunyadi" is a common one in Hungary and means of or from Hunyad. And that such name by reason of its being a common one in Hungary is in and of itself incapable of exclusive appropriation by any one, being a common descriptive personal name and also being used to designate certain districts and towns in Hungary, and has been so used as a common descriptive name in various ways in Hungary, for very many years, and was so used in the year 1889, at the time when the Eisner & Mendelson Company hereinafter referred to, became the sole
109 lessee of the said "Hunyadi Matyas" spring as hereinafter set forth.

And this defendant further answering alleges, that in the year

1889, the word "Hunyadi" or "Hunyady" in and of itself used by itself had become a generic term describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary, and that in addition to the "Hunyady Matyas," several of such wells had been registered under the Hungarian trade-mark law, the products of such wells being distinguished from each other by the word, with which the said "Hunyadi" or "Hunyady" was associated. That among such wells other than the "Hunyady Matyas," the most prominent were the "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo," and that as this defendant is informed and believes, in or about the year 1878, Andreas Saxlehner, the proprietor of the "Hunyadi Janos" spring had endeavored to stop by legal proceedings, the sale of said "Hunyadi Laszlo" under that name, but was defeated in such legal proceedings, and the sale of such "Hunyadi Laszlo" water allowed by and under the name or designation "Hunyadi Laszlo" and by and under its label, and that before the year 1889, Andreas Saxlehner had abandoned all claim or right to the exclusive use or appropriation of the word "Hunyadi" or "Hunyady" in and of itself as applied to his bitter water, and had acquiesced in the use of the said word by the various proprietors of "Hunyadi" springs in Hungary to designate their springs by and under said generic term and in the distinguishing of their specific "Hunyadi" spring from his own "Hunyadi Janos" spring by the different specific designations "Hunyady Matyas," "Hunyadi Arpad," "Hunyadi Bela," etc., and had specifically acquiesced in and acknowledged the use of said word as a generic term by himself registering the words "Hunyadi Corvin" and "Hunyadi Ersebet," as titles or designations of bitter-water mineral springs of
110 which he was the proprietor, under the then Hungarian trade-mark law.

10th. And this defendant further answering alleges, that in the year 1889, at the time when the Eisner & Mendelson Company acquired the sole right to sell in the United States the waters of the "Hunyady Matyas" spring and became the sole lessee thereof, as hereinafter set forth, the label of the "Hunyadi Janos" water as set forth in the bill of complaint was composed of three parts, or a threefold division, consisting of a certain red panel with two wings, such central red panel having as its most prominent and distinctive feature, a medallion showing the picture of a knight or Hungarian hero, and had been for many years the common mode of labelling the said "Hunyadi" bitter waters before referred to, to the knowledge and with the acquiescence of said Andreas Saxlehner, such labels being distinguished from his "Hunyadi Janos" label by their specific details, but having as their common characteristic, and as their common mode of labelling the threefold division into three parts with the center red panel and two wings, and with a medallion head on the front of said red panel, and that particularly and especially at the time that Ignatius Markus had had his controversy in 1873, with said Andreas Saxlehner, with reference to the registration under the then Hungarian trade-mark law of his said title "Hunyady Matyas," as a designation of his said bitter-water spring,

he (Markus) had then used said mode of labelling, namely, the threefold division label with a center red panel and two wings, the same, however, being distinguished from the "Hunyadi Janos" and the other "Hunyadi" waters by its specific details, and that thereafter he and his aforesaid successor, Heinrich Mattona, had used the said label in connection with the words "Hunyady Matyas" to designate the "Hunyady Matyas" bitter water, and had so used the same until the year 1889, and had registered the same as
111 required under the Hungarian trade-mark law in connection with the words "Hunyady Matyas" to designate and distinguish the "Hunyady Matyas" bitter water, and the said label was being so used at the time in 1889, when the Eisner & Mendelson Company became as hereinafter set forth, the lessee of the said "Hunyady Matyas" spring.

10th. And this defendant, further answering, alleges that the allegation in the bill of complaint that Andreas Saxlehner adopted a characteristic and novel style of bottle for containing his "Hunyadi Janos" water when he adopted such name for his water, is not true, but that the shape of said "Hunyadi" bottles was common to the trade, and that a number of mineral waters were at the time he so adopted the name "Hunyadi Janos" put up for sale and sold in Hungary in bottles of a similar shape, and that bottles of a similar shape had been for years prior to 1889 used for putting up different mineral waters in Hungary, and that such bottles were common at that time to the mineral-water trade in Hungary and were known so to be by the said Andreas Saxlehner, and especially and particularly it was known to him that since 1873, continuously down to the year 1889, and in that year, "Hunyady Matyas" water had been continuously put up for sale and sold in Hungary in bottles of the same shape and of a similar shape to that alleged in the bill of complaint herein as being the "Hunyadi Janos" characteristic and novel style of bottle, and that said Andreas Saxlehner had never up to that time asserted and made any claim to the exclusive use or appropriation of said style of bottle, and had acquiesced in the use of the bottle in which the "Hunyady Matyas" water had, as aforesaid, been put up for sale and sold in Hungary, and that said Andreas Saxlehner had never during said period asserted or claimed any exclusive right to the capsule employed by him as set forth in the bill of complaint for his "Hunyadi Janos" water, but that the said capsule had been well known to and employed
112 by the trade in Hungary for Hungarian mineral waters, and was a common and well-known trade capsule incapable of exclusive appropriation by any one, and its use as such common trade capsule for mineral waters had, long prior to the year 1889, been known to, recognized and acquiesced in by the said Andreas Saxlehner.

11th. This defendant, further answering, alleges that in or about the year 1886, "Hunyadi Arpad" bitter water commenced to be imported into the United States by the proprietor of the "Hunyadi Arpad" spring or well at Budapest, Hungary, or through his American agents, the said "Hunyadi Arpad" water being put up

for sale and sold in like bottles and in like capsules to those in which the same had been sold in Hungary, and which bottles and capsules were similar to those of the "Hunyadi Janos" waters then imported into the United States by the Appollinaris Company, to which company Andreas Saxlehner had given by contract the exclusive right to sell said "Hunyadi Janos" water in the United States, and to which bottles and capsules the complainant herein now claims the exclusive right as the claimed successor of said Andreas Saxlehner.

And this defendant, further answering, alleges that the labels affixed to said bottles of "Hunyadi Arpad" water consisted of a threefold division and were divided into three parts, composed of a center red panel with two blue wings, and having a medallion head on the front of said red panel, and had printed on said label the words "Hunyadi Arpad," designating said water.

12th. And this defendant further answering alleges, that in or about the year 1887, Heinrich Mattoni, who was then the proprietor of the "Hunyady Matyas" spring at Budapest, Hungary, commenced to import into this country through an American agent the "Hunyady Matyas" water in like bottles and with like capsules and with like labels to the bottles, capsules and labels as those of
113 the "Hunyady Matyas" water of today, and which the complainant herein now claims to be an infringement upon her rights as claimed in the bill of complaint herein, with the exception of the Seal Brand label now affixed and for several years prior to this time affixed to the "Hunyady Matyas" bottles by the Eisner & Mendelson Company for the purpose of identification and distinguishment as hereinafter set forth.

13th. And this defendant further answering alleges, that about ten years ago, in or about the years 1886 and 1887, the Appollinaris Company, Limited, brought suits in the circuit court of the United States for the southern district of New York, against the American agents of said "Hunyadi Arpad" and "Hunyady Matyas" waters, respectively, to prevent the use for any mineral water other than the "Hunyadi Janos" of any name of which the name "Hunyadi" formed a part, and that temporary injunctions were obtained by said complainant, but that subsequently and in the year 1888, on motion of the defendants therein, said injunctions were dissolved with costs against the complainants on evidence that in Hungary where all the "Hunyadi" waters originated, the word "Hunyady" was then actually and legally used and for a long time previously had been legally used as part of the names of a number of different mineral waters.

That prior to the time when such motions were dissolved and in ample time to take action, the said Appollinaris Company, Limited, notified its principal, Andreas Saxlehner, that such motions to dissolve said injunctions had been made, and requested said Saxlehner to join with said company in opposing such motions for dissolution, and in maintaining and proceeding with said suits, and that said Andreas Saxlehner peremptorily refused to join with and aid or assist pecuniarily or otherwise the said Appollinaris Company in

opposing the dissolution of said injunctions and in maintain-
114 ing and proceeding with said suits, and that after such refusal on the part of said Andreas Saxlehner, and with full knowledge on his part, and his consent and acquiescence thereto, and with his full knowledge of all the facts and circumstances relating thereto, said injunctions, were in the year 1888, dissolved, and said suits withdrawn and discontinued, and that thereafter the said "Hunyadi Arpad" and "Hunyady Matyas" waters were sold freely, openly and continuously and in competition with said "Hunyadi Janos" water, in the United States, in large quantities in the years 1888 and 1889, in the bottles and with the labels and capsules affixed thereto as hereinbefore set forth and by and under the names "Hunyadi Arpad" and "Hunyady Matyas," and with the knowledge, consent and acquiescence of said Andreas Saxlehner and his agents.

14th. And the defendant further answering alleges, that in the year 1889, the Eisner & Mendelson Company, of Pennsylvania, was engaged in the business of importing and selling mineral waters and like articles throughout the United States, and that said corporation after a most careful investigation of all the facts and circumstances, and having ascertained the facts above set forth in relation to the history of the "Hunyady Matyas" spring in Hungary, and its use and sale in said country as above set forth, and its use and sale in the United States as above set forth, and relying on the premises above set forth in relation to the same, and the facts and circumstances above set forth in relation to the history, use and sale of said "Hunyady Matyas" water in Hungary and the United States, entered into a contract with Heinrich Mattoni, the then proprietor of said "Hunyady Matyas" spring, wherein and whereby the said Eisner & Mendelson Company, of Pennsylvania, for a valuable consideration became the sole and exclusive lessee
115 of said spring for the term of twenty-five years, and acquired the sole and exclusive right to import said "Hunyady Matyas" water into the United States for said term, and to sell the same in the United States for the like term.

15th. And this defendant further alleges, that thereafter and since March 1st, 1890, the said corporation commenced to sell the same as aforesaid lessee in the United States, by and under the name "Hunyady Matyas" in like bottles and with like capsules and labels affixed thereto as now claimed by the complainant herein to be in violation of her claimed rights as set forth in the bill of complaint herein, and which bottles, capsules, and labels were similar to those in which the said "Hunyady Matyas" water had been first imported into and sold in the United States as aforesaid, in or about the year 1887, and similar to the labels, bottles, and capsules in which the said "Hunyady Matyas" water had been sold in and under and after the dissolution of the injunctions aforesaid in the years 1888 and 1889, and that the said Eisner & Mendelson Company continued under said lease to import into the United States, and sell in the United States said "Hunyady Matyas" water in like bottles and with like labels and capsules used herewith and affixed

thereto until in or about the year 1892, when the Eisner & Mendelson Company, of West Virginia, was organized, and thereupon succeeded to all the rights, property, assets, and contracts of its predecessor, the Eisner & Mendelson Company, of Pennsylvania, and this became vested with the aforesaid contract of lease given by Heinrich Mattoni to said Pennsylvania corporation, and all the rights and privileges granted in said lease with reference to said "Hunyady Matyas" water, and that said Eisner & Mendelson Company, of West Virginia, as successor of said Pennsylvania corporation has since the year 1892, and up to the present time, continuously and openly sold in the United States the "Hunyady
116 Matyas" water imported by it under the terms of said lease, using the name or title "Hunyady Matyas" to designate the same, and importing and selling the said "Hunyady Matyas" water in like bottles and with capsules and labels affixed thereto similar to those used by its predecessor, the Pennsylvania corporation, and with the knowledge, consent, and acquiescence of the complainant herein and its exclusive sellers in the United States of "Hunyadi Janos" waters, the Apollinaris Company, Limited.

16th. And this defendant further answering alleges, that soon after the said predecessor in business of said Eisner & Mendleson Company of West Virginia, commenced to sell the said "Hunyady Matyas" water in the United States under its said lease as aforsaid, it commenced to advertise the said "Hunyady Matyas" largely throughout the United States in trade journals and periodicals and in various other ways, in order to give the said water publicity and increase and extend the sale thereof, and that among other modes of advertising it sent to and distributed among all the jobbers and dealers in mineral waters throughout the United States a card or slip showing on one side the "Hunyady Matyas" label in its threefold division and with its chocolate brown panel in the centre and with its two light-blue wings, and on the other side of said card a picture of the three principal springs at Budapest, showing their comparative location and designating the same as "Hunyadi Janos," "Hunyadi Arpad," and "Hunyady Matyas," and also setting forth a comparative analysis of the waters of said three springs, and that thereupon and after said cards had been so sent and distributed, the American agent of the Apollinaris Company, Limited, called upon the said Eisner & Mendleson Company, of Pennsylvania, at its New York office in the city of New York, and stated that he had no objection to the label of the "Hunyady Matyas" spring as used by the said Pennsylvania corporation, nor to the way in which the said
117 corporation had advertised and was advertising said "Hunyady Matyas" water by and under the name of "Hunyady Matyas" with the exception of the analysis of the "Hunyadi Janos" spring as given in detail on the back of said advertising card or slip as aforesaid, but that he objected to such an analysis as unfair to the "Hunyadi Janos" water, because it was an old an- out-of-date analysis of the "Hunyadi Janos" water, and thereupon and after said objection of said agent, the said Pennsylvania corporation, the

predecessor of the Eisner & Mendleson Company, of West Virginia, at once discontinued the use of and distribution of said analysis on said advertising card or slip, and that thereafter the Apollinaris Company made no objection to the use by the said Pennsylvania corporation and its successor, of the words "Hunyady Matyas" to designate the waters sold by said corporation under the aforesaid "Hunyady Matyas" lease, not to said advertising card or slip as corrected, nor to its "Hunyady Matyas" bottles, capsules and labels, but with full knowledge of all the facts and circumstances, consented and acquiesced in the use of the same, and that the above facts and circumstances above detailed constitute an estoppel upon the complainant herein in this suit.

17th. And this defendant further answering alleges, that in the year 1889, in addition to becoming the lessee of the "Hunyady Matyas" water as above set forth and detailed, the said Eisner & Mendleson Company, of Pennsylvania, the predecessor of said West Virginia corporation as above set forth, relying upon the facts and circumstances above detailed in relation to the history of the "Hunyadi Arpad" spring and relying upon the fact that in Hungary the word "Hunyadi" or "Hunyady," had in and of itself become a generic term, became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela"
118 waters, and at once commenced to sell the same in large quantities. That the said three waters were sold by and under said respective names, and by and under the generic terms "Hunyadi" being distinguished from each other in the mineral-water trade of the United States, among druggists and dealers in mineral waters, and by consumers and the public generally, and in writing, and speaking, and ordering by emphasizing the word "Arpad," "Laszlo" or "Bela" with which the generic word "Hunyadi" was associated, and which thus distinguished said waters as well as the "Hunyady Matyas" water from the "Hunyady Janos" water, and that each of said waters "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" were put up for sale and sold in bottles similar to those of the "Hunyadi Janos" "Hunyadi Matyas," and the "Hunyadi Arpad" bottles as above set forth, and with like capsules and with labels consisting of a threefold division into three parts composed of a red central label and two blue wings, said center label having a medallion picture on its front, and being distinguished from the "Hunyadi Janos" labels by specific details, and by the respective names "Hunyadi Arpad" "Hunyadi Bela" and "Hunyadi Laszlo." That the said Eisner & Mendelson Company, Pennsylvania corporation, continued to sell the said "Hunyadi Arpad," "Hunyadi Bela" and "Hunyadi Laszlo" waters from the time in 1889 when said corporation became the American agent for said waters, during the years 1889, 1890 and 1891, in large quantities and in open competition with the "Hunyadi Janos" water, up to the time in 1892, when said corporation was succeeded in business as aforesaid by the Eisner & Mendelson Company of West Virginia, who continued to sell the said waters in like manner and in open competition with the said "Hunyadi Janos" water and in large

quantities until some time in the year 1893, when the present complainant stopped said competition so far as regards the "Hunyadi Arpad" and "Hunyadi Bela" water by purchasing the said
119 springs from their proprietor in Hungary, and thereupon revoked the agency of said company to sell said waters, and ceased to import the same in any way into the United States, and that thereafter said Eisner & Mendelson Company continued to sell the "Hunyadi Laszlo" water in open competition as aforesaid with the "Hunyadi Janos" water until some time in the year 1895, when it ceased to import the same.

18th. That by reason of the facts and circumstances above set forth, the word "Hunyadi" had at the time of the commencement of this suit and had for many years previously been a generic term to designate the above referred-to "Hunyadi" waters, and also a number of other "Hunyadi" waters imported and sold in the United States of which "Hunyadies" including those above set forth some eleven have been imported and sold in the United States during the last ten years, whereby the word "Hunyadi" has become a generic term designating a class of bitter aperient waters imported from Hungary, and that said term "Hunyadi" has so become such generic term in the United States, has been repeatedly and publicly and widely admitted by the Appollinaris Company in its advertisements, actions, conduct and in various and many ways during the last ten years, and that the bottles, capsules and labels, in which said "Hunyadi-" have been put up for sale and under which they have been sold in the United States have become in their general style, coloring and mode of printing, common to said "Hunyadis," has been repeatedly publicly and widely recognized and acquiesced in during the last ten years throughout the United States by repeated statements, acts and conduct of Andreas Saxlehner and his authorized agents in the United States during the last ten years.

19th. And for a further and separate defense, and as a
120 specific act showing that said Andreas Saxlehner never claimed or asserted any right to the word "Hunyadi" as a trade-mark in and of itself and as dissociated and as discoupled from the word "Janos," but based his right to a trade-mark to the word-"Hunyadi Janos" together and as a word symbol, this defendant alleges, that on August 31st, 1877, said Andreas Saxlehner applied to the Commissioner of Patents for the registration of the word symbol "Hunyadi Janos" as a United States trade-mark, in which said application, he stated the essential part of the trade-mark which he had adopted for use in the United States consisted of the word symbol "Hunyadi Janos," and that the said trade-mark for said word symbol was registered September 11, 1877, as No. 5144, by which proceeding he abandoned all claim of right and all assertion of right to the word "Hunyadi" in and of itself.

20th. And this defendant further answering alleges, that the Eisner & Mendelson Company of West Virginia in order to give itself further and additional protection in the use of the words "Hunyady Matyas" to designate the "Hunyady Matyas" water sold

by it in the United States, and in and to the essential parts of its "Hunyady Matyas" label used as aforesaid, by itself and its said predecessor in business, on or about July 21st, 1893, applied to the Commissioner of Patents of the United States for a trade-mark for the same, in the statement of which application for said trade-mark, said company stated that said trade-mark had been used continuously in its business since March 1st, 1890, in accordance with the facts relating to its use as above set forth, and that thereafter said trade-mark was registered on August 22d, 1893, as No. 23520, as by a reference to said trade-mark on a certified copy thereof here in court to be produced will more fully and at large appear, and that since the registration of said trade-mark the said company

121 has used the said trade-mark as stated therein and in accordance therewith and under the protection of said registration.

21st. And this defendant further answering alleges, that in the year 1893, in order to further differentiate and distinguish the "Hunyady Matyas" water sold by this defendant in the United States as aforesaid, from the "Hunyadi Janos" water, and the other "Hunyadi" water then in the market, and to associate the said "Hunyady Matyas" water with the Eisner & Mendelson Company of West Virginia as its seller in the United States, said company adopted and commenced to use as a seller's label an additional label affixed to and made a conspicuous and prominent part of the "Hunyady Matyas" label theretofore used by said company and its predecessor in business showing the representation of a red seal on a white background and with the words "Seal brand" on said label to designate the same, and thereafter commenced to advertise throughout the country in various ways the said "Hunyady Matyas" water sold by said company as "Hunyady Matyas Seal brand," advertising the same as sold by the Eisner & Mendelson Company, and that by reason of the efforts made and money spent by said company in so advertising the said "Hunyady Matyas" water as "Hunyady Matyas Seal brand" or "Seal brand" and by its use of said "Seal Brand" label the said water during the last four years has been, and was at the time of the commencement of this suit, known among the mineral-water trade and persons dealing in mineral water, and by the public and consumers generally, as "Hunyady Matyas Seal brand" or "Seal brand" or "Hunyady Seal brand," and by these names has become identified and associated with the said Eisner & Mendelson Company as the sellers of said "Hunyady Matyas" water, and during the last four years has been ordered from and known by the trade generally under said name.

122 22d. And this defendant further answering denies each and every other allegation in the bill of complaint herein not hereinbefore admitted or denied.

23d. And this defendant further answering says that the complainant is not entitled to an injunction or an account of profits or any other relief against this defendant as prayed for in the bill of complaint without this that any other matter, cause or thing in the said bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently an-

swered, confessed traversed and avoided and denied, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES G. COE,
Solicitor for Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles G. Coe, being duly sworn, deposes and says that he is the solicitor for the defendant herein, that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by defendant is that said defendant is not at present within the United States, but is in Europe and has been in Europe for about the past two months; that the grounds of deponent's belief as to all matters stated to be alleged upon information and belief in said answer are possession of the documents, labels, etc., set
123 forth in said answer or copies thereof, and conversations had with the representatives of the Eisner & Mendelson Company, the present lessee of the "Hunyady Matyas" water mentioned in said bill of complaint and in the foregoing answer.

CHARLES G. COE.

Sworn to before me, this 29th day of July, 1897.

CHARLES WAHLERS,
[SEAL.] *Notary Public, N. Y. Co.*

124 Circuit Court of the United States for the Southern District of New York. In Equity.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

SAME
vs.
SIEGEL COOPER COMPANY.

SAME
vs.
RULDOPH GIES.

SAME
vs.
LOUIS MARQUET.

Please take notice that we shall proceed to take proofs for final hearing on the part of the complainant under the 67th rule of the

supreme court for courts of equity, as amended, and in accordance with the statutes in such cases made and provided, and in pursuance of the rules and practice of this court, before John A. Shields, Esq., an examiner of this court, under said statutes and rules, at our office, No. 229 Broadway, in the city of New York, on the 10th day of September, 1897, at 11 o'clock in the forenoon.

125 We desire the evidence to be adduced in these causes to be taken orally.

You are invited to attend and cross-examine the witnesses produced. The examination will be adjourned to such time and place as may be required, without further notice.

Dated New York city, September 2, 1897.

Very respectfully, BRIESEN & KNAUTH,
Solicitors for the Complainant.

To Charles G. Coe, Esq., solicitor for the defendants.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Eugene Eble, of the city of New York, being duly sworn, says: That he is twenty-one years of age and upwards, and that on the 2d day of September, in the year one thousand eight hundred and ninety-seven, he personally served a copy of the foregoing notice of taking testimony on Charles G. Coe, solicitor for the defendants in the above-entitled suits, at his office, No. 5 Beekman street, in the city of New York, by delivering said copy to and leaving the same with the person in and in charge of said office at the time of service aforesaid.

EUGENE EBLE.

Sworn to before me this 2d day of September, 1897.

[SEAL.] MAURICE BLOCK,
Notary Public, N. Y. County.

126 *Supreme* Court of the United States for the Southern District of New York. In Equity.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
SIEGEL, COOPER COMPANY, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
RUDOLPH GIES, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
LOUIS MARQUET, Defendant.

Testimony taken under and pursuant to the 67th rule in equity, before John A. Shields, Esq., a standing examiner of this court, for final hearing on behalf of the complainant in the above-entitled cases, pursuant to the notice hereto annexed.

NEW YORK, *September* 10, 1897—11 a. m.

Met at the office of Briesen & Knauth, solicitors for the complainant.

Present: Antonio Knauth, of counsel for complainant. Charles G. Coe, counsel for defendant.

It is agreed between counsel for the complainant and defendants in the above-entitled cases that the testimony and evidence
127 for either side may be taken in all the above-entitled cases together, either party having the right to offer such additional testimony or evidence applicable to one or more of said causes separately under the title of such separate cause.

Complainant's counsel asks defendants' counsel whether he will admit the sale by them of bitter water in bottles and with labels and capsules, as appearing by the three bottles produced by complainant's counsel which are marked for identification A, B and C, and two of which purport to be labeled with the name Hunyady Matyas, while the third bears the name Hunyadi Laszlo.

Marked Exhibits A, B and C for identification, J. A. S.

Counsel for defendant replies that, in the absence of Mr. Eisner, of the Eisner & Mendelson Company, who has charge of this litigation on behalf of the said defendant company, he is unable to accede to the request of complainant's counsel at the present time, but that he will submit the matter to his client on his return to the city of New York next Wednesday, September 15th, and then reply further in the matter.

Complainant's counsel offers in evidence a certified copy of the certificate of registration of trade-mark No. 14252, registered on April 5, 1887, in the United States Patent Office by Andreas Sax-

lehner for the name "Hunyadi," together with the statement, declaration and copy of trade-mark thereto annexed.

The same is marked "Complainant's Exhibit Hunyadi U. S. Registration, Saxlehner *vs.* Eisner & Mendelson Company, J. A. S."

KALMAN SAXLEHNER, being called as a witness on behalf of complainant for final hearing, and having first been duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. Kalman Saxlehner; twenty-nine years of age; residence, New York city; Hunyadi Janos business.

128 Q. 2. What have you to do with the Hunyadi Janos business?

A. I am in charge of the New York branch of it.

Q. 3. In what name is that business conducted?

A. Under the firm of Andreas Saxlehner.

Q. 4. Since when have you had charge of this branch of the business in the city of New York?

A. Since the end of March, 1896.

Q. 5. Where is the seat of this firm of Andreas Saxlehner?

A. At Budapest, in Hungary.

Q. 6. Who is the proprietor of that firm?

A. Mrs. Emilie Saxlehner.

Q. 7. Is she your mother?

A. Yes.

Q. 8. When did she become the proprietor?

A. After my father's, Mr. Andreas Saxlehner's, death, in 1889.

Q. 9. Can you tell us the month in 1889 when your father died?

A. My father died on the 24th day of May, 1889.

Q. 10. Where were you born?

A. Budapest.

Q. 11. In Hungary?

A. Yes.

Q. 12. How long did you live in Budapest before you came to the United States?

A. All the time except when I have been traveling.

Q. 13. Now, when have you been traveling—I mean traveling to any great extent of time?

A. I have been away in 1887; have been in London for about ten months of that year.

Q. 14. And since when have you resided in the city of New York?

A. Since 1895, November.

Q. 15. Were you ever in the United States of America prior to that time?

129 A. No.

Q. 16. What was the business of your father?

A. The Hunyadi Janos.

Q. 17. What do you mean by that?

A. He was the owner of the Hunyadi Janos springs, and he was the founder of the business.

Q. 18. At Budapest?

A. Yes.

Q. 19. Is your mother, Mrs. Emilie Saxlehner, a resident of the city of Budapest?

A. Yes.

Q. 20 And is she a subject of the King of Hungary?

A. Yes.

Q. 21. How long have you been acquainted with your father's business?

A. I cannot say exactly; I came into the business in 1888.

Q. 22. Had you previous to that time any acquaintance with your father's business?

A. No.

Q. 23. Did you see what was done in the business previous to that time?

A. It is very hard to say; I have not been much in the business before that time.

Q. 24. You say that your father was the owner of the Hunyadi Janos springs; will you please state where those springs are situated?

A. The springs are situated in the district of the city of Budapest, or Ofen—that is a part of the suburbs of the city; they lie in the valley of Orsod.

Q. 25. Is this valley of Orsod situated within the city limits of Budapest?

A. Yes; that is what I meant by "district."

Q. 26. Was your father the proprietor of this place when he died?

A. Yes.

130 Q. 27. And your mother then became the proprietor?

A. Yes.

Q. 28. How many such springs are there situated together, or about how many?

A. About 112.

Q. 29. Do you know whether there always have been as many as 112 springs from which the Hunyadi Janos water has been drawn?

A. No; in former years there were less.

Q. 30. And additional wells have been dug up later on?

A. Yes.

Q. 31. Are you acquainted with the bottles and labels in which this water was sold by your father?

A. Yes; I know the bottles.

Q. 32. Did your father export this Hunyadi Janos water to the United States of America?

A. He exported it, but not since the duration of the Apollinaris contract, because then it was exported by the Apollinaris Company.

Q. 33. What contract are you referring to in your answer?

A. The contract which was made between the Apollinaris Company and Andreas Saxlehner in 1876, I think.

Q. 34. Please look at the contract which I now show you, between Andreas Saxlehner, of Budapest, and the Apollinaris Company, Limited, of March 3, 1876 (this being a copy), and state whether that is the contract to which you referred in your answer.

A. Yes.

(Complainant's counsel offers in evidence the copy of said contract identified by the witness, subject to correction by the original. The same is marked "Complainant's Exhibit Apollinaris Contract, Saxlehner *vs.* Eisner & Mendelson Company, J. A. S.")

Q. 35. As I understand your testimony, during the duration of this contract, your father did not sell in the United States of
31 America any Hunyadi Janos water, but the same was sold by the Apollinaris Company?

A. Yes.

Q. 36. And the same is true as to the business as conducted by your mother, since 1889?

A. Yes, since March, 1896.

Q. 37. What is since March, 1896?

A. In March, 1896, the contract between the Apollinaris Company and the firm of Andreas Saxlehner terminated, and since that time Mrs. Emilie Saxlehner, or the firm of Andreas Saxlehner, imports the water directly to the United States.

Q. 38. Have you since that time attended to the sale of the Hunyadi Janos water on behalf of the firm of Andreas Saxlehner, and of the complainant, here in New York?

A. Yes, in the United States.

Q. 39. Now, please state in what bottles and under what labels and capsules the Hunyadi Janos water is sold by the complainant in the United States?

A. I produce a bottle which shows the style of bottle and label and capsules used by the complainant since the termination of the Apollinaris contract in March, 1896.

(Complainant's counsel offers in evidence the bottle produced by the witness.

The same is marked "Complainant's Exhibit Complainant's Bottle, Saxlehner *vs.* Eisner & Mendelson Company, J. A. S.")

Q. 40. Now, please state whether, since March, 1896, the Hunyadi Janos water has been sold by you and by the complainant in the United States always in this form—I mean in the kind of bottle and label and capsule presented by this exhibit?

A. Yes, sir.

Q. 41. In what form of bottle, label and capsule was the Hunyadi Janos water sold in the United States previous to March, 1896, if you know?

32 A. In the same kind of bottle, except that the label had slight differences from the present one.

Q. 42. Can you produce a specimen of such a bottle, label and

capsule as used in the sale of the Hunyadi Janos water in the United States previous to 1896?

A. Yes, I produce one bottle.

(Complainant's counsel offers in evidence the bottle produced by the witness.

The same is marked "Complainant's Exhibit Complainant's Former Bottle, Saxlehner *vs.* Eisner & Mendelson Co., J. A. S.")

Q. 43. State how long the Hunyadi Janos water has been exported by your father, and later on by your mother, to the United States in bottles and with labels as appearing on the last bottle produced by you marked "Complainant's Exhibit Complainant's Former Bottle."

A. Since the beginning of the Apollinaris contract in 1876.

Q. 44. What is the meaning of the words "Hunyadi Janos"?

A. John Hunyadi.

Q. 45. Who was John Hunyadi?

A. He was a celebrated Hungarian hero, who lived, I think, in the fifteenth century.

Q. 46. And what is the meaning of the words "Buda Keseruviz," which I find on the label?

A. That means "bitter water of Buda" or "from Buda," I don't know which is better.

Q. 47. I notice that the bottle, "Complainant's Exhibit Complainant's Former Bottle," bears in addition to the large blue and red label, also a strip of blue paper containing the words "Bottled in Hungary, Andreas Saxlehner, Budapest, proprietor of the spring;" since when has this additional strip been used on the bottles sold in this country?

A. I cannot tell that exactly; it may be eight years or thereabouts; I cannot say exactly the number; I don't remember—eight or ten years.

Q. 48. Is it the custom of complainant's firm now, instead
133 of pasting such additional strip to the labels, to print a similar statement at the end of the blue and red label?

A. Yes.

Q. 49. This strip was put on only to show that the water was bottled in Hungary?

A. Yes.

Q. 50. Is there any difference between Pest and Budapest?

A. No difference so far that Pest and Budapest were two different cities, but they have been consolidated in eighteen hundred and seventy—I don't know the year exactly.

Q. 51. Now, please state what the natural boundaries are of the district of Orsod?

A. Orsod valley is surrounded by mountains as follows: On the north, there is the Dobogo mountain; west, the Kuckuck; on the east there is the Peter mountain, and on the south—I don't know the name of that mountain.

Q. 52. Are there any other springs of bitter water situated in this

district of Orsod, besides those owned by your mother, from which the Hunyadi Janos water is drawn?

A. No.

Q. 53. Can you state what the extent of the area is in which the complainant's Hunyadi Janos springs are situated?

A. I cannot tell exactly; over a hundred acres.

Q. 54. Is the water of those various wells bottled separately, or is it conducted into common receptacles?

A. Yes, it is conducted into a cistern.

Q. 55. And where are the bottles filled?

A. At the spring in the so-called bottling establishment.

Q. 56. That is, situated close to the springs?

A. Yes, sir.

Q. 57. Is your mother the proprietor of those grounds on which the springs are situated?

A. Yes, she is.

Q. 58. And, as I understand the situation, she has been such proprietor since the time when Andreas Saxlehner died in 1889?

134 A. Yes.

Q. 59. How many people are employed in the complainant's business of bottling the Hunyadi Janos water and selling it?

A. About three hundred.

Q. 60. Did your father sell this Hunyadi water outside the limits of Hungary?

A. Yes, he did.

Q. 61. To what countries was it sold?

A. To all countries all over the world it was sold.

Q. 62. Do you know this from coming in personal contact with the water in other countries?

A. Yes, sir; I saw it in all the countries where I traveled.

Q. 63. Have you been traveling very extensively in Europe?

A. Yes.

Q. 64. In what countries have you been?

A. Well, I traveled in Hungary, in Austria, Germany, Italy, France, Switzerland, Belgium, Holland, England, and some parts of northern Africa.

Q. 65. Can you state under what name, or names, the Hunyadi Janos water is sold in those countries?

A. That is different. Generally, in the French-speaking or Latin—countries of the Latin races, they call it by the "Janos," "Eau de Janos," or "Aqua de Janos," and in the English-speaking countries they generally call it "Hunyadi" or "Hunyadi Janos."

Q. 66. How is the water called in this country?

A. "Hunyadi" or "Hunyadi Janos water."

Q. 67. Do you in your business get any orders from customers for "Hunyadi" water?

A. Yes.

Q. 68. Has that been the case ever since the time you opened the branch business of the complainant here in this city?

A. Yes, sir.

Q. 69. Is the complainant, Emilie Saxlehner, doing business in Budapest under the firm name of Andreas Saxlehner?

135 A. Yes, sir.

Q. 70. Please explain how this came about?

A. My father, in his last will, left the business as a firm, and everything that belonged to the business, to my mother—that is, she became the sole proprietor.

(Mr. Coe: Objected to, as not the best evidence.)

Q. 71. What I want to know is this, whether your father had in his lifetime already registered his name of "Andreas Saxlehner" as a firm in Budapest?

A. Yes.

Q. 72. And your mother is still conducting the business of that firm as a registered firm there?

A. Yes.

Q. 73. Can you state approximately how large this business of bottling or selling the Hunyadi Janos water is or what its output has been?

A. We generally bottle six million bottles a year.

Q. 74. At what price is the Hunyadi Janos water sold to the consumer in this country?

A. Twenty-five cents.

Q. 75. At what price does the complainant sell it to the wholesale or retail trade?

A. If the water is bought in larger quantities, for $8.50 a case; smaller quantities for $10, or single cases for $10.

Q. 76. How many bottles does a case contain?

A. Fifty.

Q. 77. And those are bottles of the size shown by the specimens which you have produced?

A. Yes, sir.

Q. 78. Have those prices been uniform, so far as your experience goes while you have been in charge?

A. Yes.

Q. 79. How did this contract with the Apollinaris Company come to terminate in March, 1896?

A. They had the sole right to terminate it.

136 Q. 80. And did the company give notice to your mother to terminate the contract then?

A. Yes; one year previous.

Q. 81. Was your father ever in the United States or your mother?

A. No; never.

Q. 82. Is the name "Hunyadi" of value to you in your business?

A. Of great value.

Q. 83. Can you tell approximately how much money has been spent in the business of your father, and thereafter of your mother, in advertising the name of your water?

A. I cannot say the sum, but it has been hundreds and hundreds of thousands of florins.

Q. 84. Have your father, and your mother after him, endeavored to make your water known to physicians?

A. Yes.

Q. 85. In what way?

A. By pamphlets, sending out pamphlets and all kinds of printed matter.

Q. 86. Has it also been advertised in the public papers?

A. Yes; in the daily papers and in medical papers.

Q. 87. Can you produce some specimens of the publications and advertisements which have been sent out by your father or your mother in furthering this business?

A. I produce two samples of such publications; those are only two of the many.

Q. 88. You mean there have been many more similar publications issued?

A. Oh, yes.

Q. 89. Has that always been the case so long as you have been acquainted with the business?

A. Yes.

Q. 90. Can you state what is the expense of publishing a book like the book which you produce?

137 A. This was for Europe; I cannot say exactly how much; the larger book in German language was for Europe; I cannot say how much it cost to send them out, but this for the United States—the smaller book—that cost, I think, about $16,000.

Q. 91. That is the small blue book to which you are referring now?

A. Yes.

(Complainant's counsel offers the two books produced by the witness in evidence.

Books marked "Complainant's Exhibits Complainant's Publications Nos. 1 and 2, Saxlehner *vs.* Eisner & Mendelson Company, J. A. S.," respectively.)

Q. 92. I notice that the book publication No. 2 contains a view of the complainant's springs in the front of the book; is that a correct view of the spring establishment?

A. It is a photograph.

Q. 93. Made from a photograph?

A. Yes; made from a photograph.

Q. 94. What are the little houses shown in this view?

A. Those are the wells; that is, in the houses are the wells.

Q. 95. Is each well protected by a little house over it?

A. Yes; covered with a little wooden house.

Q. 96. Is the water of those wells from which the Hunyadi Janos water is drawn of the same quality in the different wells—I mean the same chemical constituents?

A. Yes.

Q. 97. Are there any tests made, or analyses, to investigate this fact from time to time?

A. I can refer to the analyses of Liebig, Bunsen, Fresenius, and

especially to the analyses which was made by the Lancet commission in 1896; I don't know—is it necessary to refer to the Lancet number?

Q. 98. You might tell us something about it; what was that commission?

A. That was a commission on natural mineral waters.

138 They made investigations of different mineral springs, and so they did of the Hunyadi Janos springs, and the commission made analyses of the different wells, by which one easily can see that the chemical composition of the waters of the different wells are the same, or very nearly the same.

Q. 99. Are those springs or wells connected with each other by any subterraneous passages?

A. You mean natural?

Q. 100. No; not natural.

A. They are. The waters from the different wells are conducted by pipes to the cistern.

Q. 101. How many such cisterns are there?

A. Well, we have one.

Q. 102. You mean one is in use now?

A. One is in use.

Q. 103. And the waters of all those different wells are led into that cistern?

A. Yes.

Q. 104. And from that cistern the water is drawn and filled into the bottles?

A. Yes, sir.

Q. 105. Can you state how much it cost to build that cistern?

A. I cannot state the amount; many, many thousands of dollars.

Q. 106. How large is it?

A. The cistern contains 80,000 litres of water; I don't know how much a litre is.

Q. 107. Are there any precautions taken for keeping the water of those wells in a pure condition?

A. Yes; no human hand or any organic material comes in contact with the water.

Q. 108. Is there anything done with reference to keeping the grounds clean?

A. Yes, sir; we have water drainage and all the sanitary precautions.

139 Q. 109. Do you know how the sale of the Hunyadi Janos water compares in extent with the other bitter waters which are to be had in the market?

A. Well, I cannot exactly say that, but I think we sell more that the other—the Hunyadi Janos water is sold more than the other water.

Q. 110. When the contract with the Apollinaris Company was made, who attended to the advertising of the Hunyadi Janos water in this country—during the time of the contract?

A. The Apollinaris Company.

Q. 111. Are there any measurements made at the complainant's mineral springs to determine the specific gravity of the water?
A. Yes, every week, two or three times.

Direct examination closed.
(Adjourned till 2 p. m.)

KÁLMÁN SAXLEHNER.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

140 NEW YORK, *September* 10, 1897—2 o'clock p. m.

Met pursuant to adjournment.
Present: Counsel as before.

Adjourned to Monday, September 13, 1897, at 2 p. m.

NEW YORK, *September* 13, 1897.

Met pursuant to adjournment.
Present: Counsel as before.

WILLIAM B. HIGBEE, called and sworn as a witness on the part of the complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. What is your name, age, residence and occupation?
A. William B. Higbee; age, 42; Brooklyn; grocer.
Q. 2. In whose employ are you?
A. Acker, Merrall & Condit.
Q. 3. In what capacity are you employed by them?
A. Well, I have charge of the department including that of the mineral waters, champagnes and clarets, white wines, of that kind.
Q. 4. How long have you been in the employ of Acker, Merrall & Condit?
A. About seventeen years.
Q. 5. All the time in this city?
A. Yes, sir.
Q. 6. State whether you know the Hunyadi Janos water of the complainant Emilie Saxlehner, and if so, how long you have known that water?
A. I have known it probably twenty years; I have handled it to a great extent for the last seventeen years.
Q. 7. Are you familiar with its label and packing?
141 A. Very familiar, I should say.
Q. 8. Do you recognize any of the bottles of it, as standing here on the table?
A. I do; yes, sir.
Q. 9. If so, point them out, if you please?
A. (Witness points to bottle marked "Complainant's Exhibit Complainant's Bottle.")
Q. 10. How long have you known of complainant's water under this label?

A. It had the Apollinaris label on it until the spring of 1896.

Q. 11. What do you mean by that?

A. It had that diamond on to it there (indicating "Complainant's Exhibit Complainant's Former Bottle"). Since that this has been the style of label it has been using (indicating "Complainant's Exhibit Complainant's Bottle"). Up until the spring of 1896, the bottle they used had the red diamond on to it, which is the Apollinaris Company's brand as I understand it.

Q. 12. Since the spring of 1896 that label has remained the same, without the red band on it, or substantially the same?

A. The same or substantially the same without the red band on it.

Q. 13. Now, please state how long you have sold this Hunyadi Janos water in New York city under this red and blue label as it appears before you?

A. Handled it ever since I have been in the employ of the firm I am with at present.

Q. 14. And when did you go into the employ of the firm?

A. About 17 years ago this month.

Q. 15. Has your firm of Acker, Merrall & Condit sold this water in large quantities?

A. In very large quantities.

Q. 16. Has that continued to be the case from year to year?

A. Well, I should say we have sold more probably these last six or eight years than formerly.

142 Q. 17. From whom did Acker, Merrall & Condit procure this Hunyadi Janos water?

A. Up to the spring of 1896 they got it from the Apollinaris Company.

Q. 18. Here in this city?

A. This city.

Q. 19. And since the spring of 1896?

A. We have got it from the agents of Saxlehner.

Q. 20. Under what name is this water ordinarily ordered by the public?

A. Hunyadi water or Hunyadi Janos.

Q. 21. You mean both names or either of them?

A. Either of them would apply to either of those bottles.

Q. 22. If you were to receive an order for Hunyadi water, what do you suppose it to be, or mean?

A. Hunyadi Janos every time.

Q. 22*a*. And you filled it by providing Hunyadi Janos water?

A. Every time.

Q. 23. And has that been the case for all the years that you have been acquainted with the sales of this water?

A. Ever since I knew anything about the water.

Q. 24. Can you state whether the water is more commonly ordered as Hunyadi Janos water or Hunyadi water?

A. We have orders for both; we use the term Hunyadi in our

concern, as it is shorter, saves trouble of scratching out the word Hunyadi Janos in full.

Direct examination closed.
No cross-examination.

W. B. HIGBEE.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

143 JOHN R. AGNEW, called and sworn as a witness on behalf of the complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. John R. Agnew; age, forty-eight; residence, 522 West One hundred and forty-third street, New York city; occupation, accountant.

Q. 2. Please state in whose employ you are as an accountant.

A. Park & Tilford.

Q. 3. How long have you been in their employ?

A. Over twenty years.

Q. 4. Have you during that time come in contact with the complainant's Hunyadi Janos water?

A. Constantly.

Q. 5. And how have you come in contact with it?

A. In settlement of all their invoices for the water, and by frequent reference to the article itself.

Q. 6. Can you state by pointing out a label to us, in what way or under what label you first knew this water in this market?

A. My first recollection of it is a label somewhat substantially the same as that (indicating Complainant's Exhibit Complainant's Former Bottle).

Q. 7. How long have you known this water by means of this label?

A. Fifteen or sixteen years.

Q. 8. Did you at that time see or know any other water having a similar red and blue label as appearing upon this bottle?

A. No, sir.

Q. 9. By what name did you know this water?

A. By the names of Hunyadi, Hunyadi water and Hunyadi Janos.

Q. 10. Do you know how the public ordered it from Park & Tilford—bought it?

144 A. Ordered by either of those three names.

Q. 11. And whenever the water was called for under either of those names did they furnish complainant's water?

A. Yes.

Q. 12. Or that of the firm of Andreas Saxlehner—the complainant has been in business only for six years, I think?

A. Furnished water under that label.

Q. 13. From whom did Park & Tilford get this water previous to the spring of 1896?

A. From the firm of Charles Graef & Company, and prior to that from the firm of Frederick de Bary & Company.

Q. 14. Were those firms subagents of the Apollinaris Company, Limited?

A. Yes, sir.

Q. 15. And during that time the water, as I understand it, bore a label such as is shown on the Exhibit Former Bottle, indicating the name of the Apollinaris Company on top?

A. Yes, sir.

Q. 16. Now, since the spring of 1896, where have Park & Tilford bought this water?

A. New York city, from Andreas Saxlehner.

Q. 17. You mean from that branch of the firm established here?

A. Yes.

Q. 18. When you first knew of this Hunyadi Janos bitter water, did you know any other bitter waters appearing in similar bottles or in a similar style of packing, in the market here?

A. None in similar bottles; there were other bitter waters.

Q. 19. In other bottles you mean?

A. No other bottles this style.

Q. 20. How long have you known of the water I show you which has the name of Rubinat?

A. I think for three or four years.

Q. 21. And how long have you known of this water called Villacabras?

145 A. We did not handle that water.

Q. 22. Have you known the bitter water known as Carabaña?

A. No.

Direct examination closed.

No cross-examination.

JOHN R. AGNEW.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

WILLIAM STEMPEL, called and sworn as a witness on behalf of the complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. What is your name, age, residence and occupation?

A. William Stempel; age, 25; 236 East Eighty-first street, city of New York; stationery clerk.

Q. 2. Where are you employed?

A. Findler & Wiebel, 121 Nassau street.

Q. 3. State whether you have known the complainant's Hunyadi Janos water, and if so, how long have you known the same?

A. I have known Mr. Kalman Saxlehner for the past two years. I have been doing this business for him since last October—getting these various affidavits.

Q. 4. How long have you been acquainted with the Hunyadi Janos water?

A. Been acquainted for some number of years; I cannot say how long.

Q. 5. Did you at any time go to the business place of the defendant Siegel-Cooper Company to purchase any specimens of such water?

146 A. Yes; I went there January 15th and asked for Hunyadi water; when they asked me what kind I would want, I would ask them which was the genuine or which was the best; they would say the Janos was the genuine; they have told me so; but seeing the bottles Hunyadi Matyas on the counter I asked them what that was. The young lady in charge told me it was water just about as good, but cheaper. I bought a bottle of that; paid about seventeen cents for it, I believe.

Q. 6. Did you also purchase a bottle of Hunyadi Lajos water on the same occasion?

A. I believe I bought a bottle at the same time—yes—with the same words; told her I would try it, to see what difference there was in it.

Q. 7. Did you pay for that also?

A. Yes, I paid for that the same price.

Q. 8. Can you produce the bottles which you purchased on that occasion?

A. Yes, sir.

Q. 9. Did you mark them at the time to identify them?

A. Yes, sir.

Q. 10. How did you mark them?

A. "W. S. Siegel-Cooper Company, January 15, 1897, Lajos No. 2." I produce a bottle of Hunyady Matyas bought at the same time. I marked it to identify it "W. S. Seigel, Cooper & Company, No. 1."

(Complainant's counsel offers in evidence the two bottles produced by the witness.

The same are marked "Siegel, Cooper Co. No. 1, J. A. S., ex'r," and "Siegel, Cooper Co. No. 2, J. A. S., ex'r.")

Q. 11. Have you ever at the request of the complainant's manager in this city, Mr. Kalman Saxlehner, made any inquiries among druggists in this city or elsewhere concerning the sale of complainant's Hunyadi Janos water, and also of that Hunyady Matyas water?

147 A. Yes, I have gone to a great many places; druggists; they claimed that the Hunyadi Janos water was the genuine, but they kept the others in stock on account of people demanding a cheaper grade. They found that amongst the Hebrew class of people, in many cases, only demanding the cheaper grade; they think it is just as good.

Q. 12. When did you make those inquiries?

A. Well, that is for the past six months.

Q. 13. Did you make them continuously or at odd times at the request of Mr. Saxlehner?

A. More at odd times—yes—various occasions.

Q. 14. And where did you make them?

A. In the city of New York, Brooklyn, Albany, Buffalo, Niagara Falls.

Q. 15. Did you demand any Hunyadi water in going to druggists or similar places?

A. In the majority of the places I demanded a bottle of Hunyadi water, whereupon they would give me Matyas, and I would ask them if it was the genuine; in a great many places they would say yes. Then again they would say it is the same thing—it came from the same springs in Budapest, only owned by different parties.

Q. 16. Did you at times also demand Hunyadi Janos water in going into the druggists?

A. Yes, I did that very often; I did that in a great many occasions; and I have done it with a slip of paper—wrote on "One bottle Hunyadi Janos," and demanded that with the slip of paper, where they would hand me Matyas. Certainly I knew what the water was; I could have told them right outright it was not Janos, by the looks of it, but I just wanted it as evidence to show that the druggists palmed it off on people that did not understand it.

Q. 17. Did you on such occasions also obtain the Hunyady Lajos water from druggists?

Mr. Coe: (Objected to as immaterial and irrelevant.)

A. That was the same as the Matyas.

148 Q. 18. Can you state what representations were made with reference to that water when it was handed to you?

(Same objection.)

A. Yes; I have been in a place here in Buffalo. They told me—they handed me a bottle of Lajos. I told them, "This is not genuine." They said, "Well, it is the same thing." I don't recollect whether they said a different name or a brother. I believe he said it was a brother; otherwise it is the same water.

Q. 19. What did he mean by saying it was a brother?

A. A brother of Janos—John.

Q. 20. You mean Hunyady Lajos was represented as a brother of Hunyadi Janos?

A. Hunyadi Janos; and then again this way: Lajos had wiped all these waters out of the market, and Lajos had the whole control of it now.

Q. 21. That is what druggists would say to you?

A. In Albany.

Q. 22. Did you on similar occasions also obtain Hunyadi Janos water when you called for it?

A. Oh, yes.

Q. 23. Can you state what places, or where?

A. There are so many of them it is very hard for me to state exactly where they were.

Q. 24. Can you state of what kind of druggists you obtained the Hunyadi Janos water when calling for it?

A. Mostly around the better class of people—Columbus avenue, Third avenue, Fourth avenue, Lexington avenue, and those places—One hundred and twenty-fifth street.

Q. 25. And where did you obtain the Hunyady Matyas or Hunyady Lajos water, upon calling for Hunyadi Janos?

A. Down around the lower East side—the Bowery, east.

Q. 26. Is that in the poorer quarters of the city?

A. The poorer quarters of the city.

149 Q. 27. Was the same true as to Brooklyn and Buffalo, and other places you went to?

A. In Brooklyn; in fact, all around Brooklyn—a great many places there around Williamsburg, palming off the Matyas and Lajos. Albany and Buffalo—those places there. I don't know how the districts run there. I cannot say anything about that.

Q. 28. You have produced a bottle of Hunyady Matyas water which bears a prominent figure 3 on the red centre label; did you on such occasions, as stated by you, also obtain other bottles of Hunyady Matyas water, with some different labels?

A. Yes; I have bought with a red seal and with a figure—I am not positive whether it was "2"—I believe it was the figure 2, and with a red and white label.

Q. 29. Did you also obtain bottles of Hunyady Matyas water like the one which I now show you marked "Exhibit B for identification"?

A. Oh, yes; the same thing.

Q. 30. Can you state whether you obtained the bottles with this kind of label of Hunyady Matyas more frequently or less frequently than the number 1 or 3?

A. More frequently than the 2 or 3.

Q. 31. But they all have in common the blue color and the reddish color of the centre field?

A. Yes.

Direct examination suspended.

WILLIAM STEMPEL.

(Adjourned to Tuesday, September 14, 1897, at 2 p. m.)

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

150 NEW YORK, *September* 15, 1897.

Met pursuant to adjournment.
Present: Counsel as before.

ROBERT PEARCE, called on behalf of complainant, being duly sworn, testified as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?
A. The name you have; my age is forty-seven; residence, Brooklyn, New York; and office, manager of Frederick de Bary & Co.
Q. 2. How long have you been connected with the firm of Frederick de Bary & Company?
A. Over thirty years.
Q. 3. Here in this city of New York?
A. Always in New York.
Q. 4. Did that firm ever act as agents for the Apollinaris Company, Limited, in this city, for the importation and sale, amongst others, of Hunyadi Janos water?
A. They did.
Q. 5. Please state during what years your firm acted as such agent?
A. From about the middle of 1877 up to December, 1888.
Q. 6. Can you point out the labels under which the Hunyadi Janos water was sold by your firm in this country?
A. Yes, I think so.
Q. 7. (Complainant's counsel handing witness a sheet of labels.) Will you please do so?
A. These red and white labels, we had a few shipments, I believe, of those when we first took the agency; after which it came under the red and blue, and continued under the red and blue up till the time we relinquished the agency in 1888. I could not say how long we received shipments of the red and white. I think only for a short time.

151 Q. 8. By referring to the red and white label, do you mean the red and white Hunyadi Janos label, which is printed on top of the sheet now before you?
A. I do; yes.
Q. 9. Which has been marked "Complainant's Exhibit Hunyadi Janos Label Used in the United States"?
A. Yes.
Q. 10. Now please state which of the red and blue labels on that sheet you referred to, in stating that your firm had sold the water under those red and blue labels?
A. I judge this one here—No. 3.
Q. 11. You mean the label with the red print "Frederick de Bary & Co."?
A. Yes. We may have had it without that printing "Frederick de Bary & Co." I don't think we had it all the time with "Frederick de Bary & Co." on it.
Q. 12. What I wish to know is, whether, with the exception of

the red and white label to which you have referred, the botties of Hunyadi Janos water, as sold by your firm, always bore the red and blue label?

A. Undoubtedly.

Q. 13. And that continued to be the case from the year 1877 until 1888?

A. As I say, barring a few shipments, perhaps, of the red and white label, when we first took the agency, that was the only label we had up to the time of relinquishing the agency in 1888.

(Complainant's counsel offers in evidence the sheet referred to by the witness.

Sheet marked "Saxlehner *vs.* Eisner & Mendelson Company, Complainant's Exhibit Hunyadi Janos Labels Used in the United States, J. A. S.")

Q. 14. Now please state in what kind of a bottle, and with what kind of a capsule the water was sold by your firm?

A. Well, I don't know as I can explain the shape of the bottle.

152 Q. 15. You might just refer to this—whether that is the same or similar?

A. This is a bottle similar to that, and the capsule always the same (indicating "Complainant's Exhibit Complainant's Former Bottle").

Q. 16. As the one before you?

A. Yes; this trade-mark of the company that was put on.

Q. 17. You mean the yellow and red?

A. I cannot give you the year they adopted this diamond trade-mark on their bottles—the Apollinaris Company.

Q. 18. You are now referring to the small separate label, showing a red diamond?

A. Yes.

Q. 19. Was the Hunyadi Janos water sold in large quantities by your firm during those years?

A. Yes; quite large quantities.

Q. 20. Was it advertised in this country?

A. Very extensively; yes.

Q. 21. How was the water known colloquially among the public?

A. I think the general public probably as "Hunyadi."

Q. 22. How did the orders come to your firm for water of this kind?

A. That I could not answer offhand; I think, though, that the orders would say "Hunyadi water," perhaps sometimes "Hunyadi Janos."

Q. 23. It was known by both names?

A. Oh, yes; certainly.

Q. 24. In what manner was the Hunyadi Janos water advertised in this country?

A. Well, in medical books, newspapers, pamphlets—such ways.

Q. 25. Who attended to the advertising of the water? Did your firm?

A. We did; yes, sir.

153 26 Q. Can you state what the extent of the sale of this water was as compared with the sale of other bitter waters in the market?

A. No, sir; I could not.

Q. 27. At the time when your firm took up the agency for the sale of this water, was there any other water in the market bearing a red and blue label, as shown by this specimen?

A. That is a question I could not answer.

Q. 28. You don't know?

A. I don't know—no.

Q. 29. Were you at that time acquainted with any other bitter waters?

A. I was not.

Cross-examined by Mr. COE:

Cross-Q. 30. In your last answer you say you were not at that time acquainted with any other bitter water in the United States; did your firm between 1877 and 1888 become acquainted with any other bitter waters in the market?

A. I believe they did.

Cross-Q. 31. Did your firm, between 1877 and 1888, know of Hunyady Matyas water being sold in competition with Hunyadi Janos?

A. Well, I could not answer for the firm; I believe though there was such a water in the market.

Cross-Q. 32. And do you know whether there was water called Hunyady Arpad in the market?

A. I do.

Cross-Q. 33. And the Hunyady Matyas water that you have referred to, do you recollect in what style of bottle and labels it was put up?

A. I do not. I only know that there was such a water.

Cross-Q. 34. You know that there was such a water on sale?

A. Yes.

Cross-Q. 35. Prior to 1888, the time when you relinquished the agency?

154 A. I believe there was; yes, sir.

Cross-Q. 36. As I understand you, your recollection of the Hunyady Arpad water is more vivid than your recollection of the Hunyady Matyas water?

A. Yes.

Cross-Q. 37. Do you recollect the style of bottles and the labels under which the Hunyady Arpad was sold in the market?

A. I do.

Cross-Q. 38. Please describe the styles as well as you can.

A. Well, the bottle and label and capsule and everything was very similar to the Hunyadi Janos (referring to Complainant's Exhibit Complainant's Former Bottle), in fact, a colorable imitation of the label, red and blue.

Cross-Q. 39. The Hunyady Arpad water which you have just referred to, as I understand you then, was put up in similar bottles with similar capsules, and had a label thereon consisting substantially of a threefold panel, the center panel being of red, and the two wings or side panels being of blue; am I correct?

A. Yes.

Cross-Q. 40. How long prior to 1888 did you know of this Hunyady Arpad water being in the market?

A. Well, I could not give you the exact year, but it was some time before 1888.

Cross-Q. 41. Now, with reference to the Hunyady Matyas capsules, bottles and labels, were they not substantially like the bottles, capsules and labels I now show you on the bottle marked "Exhibit B for Identification"?

A. To my best belief, they were.

Cross-Q. 42. And how long did you know of Hunyady Matyas being put up and sold in the market under such capsules, bottles and labels, prior to 1888?

A. That I could not say; some time before 1888, I think, to the best of my belief.

Cross-Q. 43. Are not the Hunyady Arpad and Hunyady
155 Matyas waters which you have referred to sold also as Hunyadi water?

A. I could not answer you; I don't know.

Cross-Q. 44. Do you mean by your last answer you will positively say that they were not, or that you don't recollect?

A. No, I don't mean that; I mean by my answer that I presume they were sold as "Hunyadi" in a general way, but I don't know positively, except I can answer for myself—my own experience with the Hunyady Arpad. I have gone into a drug store and asked for a bottle of Hunyadi and got Arpad or Matyas; I don't know anything about——

Cross-Q. 45. And this last fact as to your buying Hunyady Arpad from a drug store as Hunyadi, goes back prior to 1888?

A. Oh, yes; certainly.

Cross-Q. 46. And since 1888 what is your recollection?

A. I think I have had the Arpad since then also; still I won't swear to that.

Cross Q. 47. Have you had the Hunyady Matyas since 1888?

A. No, I guess not.

Cross Q. 48. Do you or do you not know, as a matter of fact, that, since 1888, the Hunyady Matyas has been sold in the market in competition with Hunyadi Janos?

A. I do not.

Redirect examination by Mr. KNAUTH:

Redirect Q. 49. When stating your impression concerning the sale of Hunyady Matyas water prior to 1888, under the label and style of bottles shown to you by defendant's counsel, were you not mistaken about the color of that label used for Hunyady Matyas then?

A. Well, I did not answer positively about the label and style of package, that is something which I could not be positive about; that was simply an impression that it was put up similar to the Hunyadi Janos.

Redirect Q. 50. I show you now a red and white label
156 bearing the name of Mattoni & Wille, Budapest, and request you to examine that label and state whether that was not the label which was then on the Hunyady Matyas water which you saw or purchased?

A. My remembrance does not carry me back what the label looked like. It might have been red and white as this label is. I was always under the impression that it was blue and red, similar to the Hunyadi.

Redirect Q. 51. You have no definite recollection upon the subject?

A. Not at all; my answer was only in a general way, that it resembled the ordinary Hunyadi Janos. If the stenographer will be kind enough to read me my reply, the question and my reply relating to that Matyas; because I could not say positively what the label was, because I don't know—I don't know today; I don't want to leave the impression I am swearing positively to something I have no recollection of; that is all.

Signature of the witness to the testimony waived.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

BERNHARD OSTERMANN, called on behalf of the complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. What is your name, age, residence and occupation?

A. Bernhard Ostermann; twenty-two; 1561 Avenue A, New York city; occupation, waiter.

Q. 2. Did you ever, at the request of Mr. Kalman Saxlehner, purchase any bottles of Hunyadi water?

A. Yes, sir.

Q. 3. Did you purchase a bottle of such water at the store of Rudolph Gies, at No. 396 Third avenue, in this city?

157 A. Yes, I was there one day, I was in the store at the time, and asked for a bottle of Hunyadi with a red diamond on it.

Q. 4. Do you remember when that was?

A. That was in February.

Q. 5. Of this year?

A. Yes, sir.

Q. 6. Now what did you get?

A. Well, he gave me a bottle wrapped up in paper, and charged eighteen cents to me.

Q. 7. Did you pay it?

A. I paid him, and he gave me a receipt for it.
Q. 8. Can you produce the receipt which you got?
A. Yes, sir.
Q. 9. Please look at this receipt, and state whether that was the receipt which you obtained?
A. Yes, sir; I put my name in.

(Complainant's counsel offers in evidence the receipt produced by the witness.
Receipt marked "Saxlehner vs. Eisner & Mendelson Company, Complainant's Exhibit Gies Receipt, J. A. S.")

Q. 10. Can you also produce the bottle which you obtained on that occasion from the druggist?
A. Yes, sir; Hunyady Matyas.
Q. 11. Is this the bottle?
A. Yes; I marked my initials on it.

(Complainant's counsel offers the bottle referred to by the witness for identification.
Bottle marked "Saxlehner vs. Eisner & Mendelson Company, Osterman, No. 1 for identification, J. A. S.")

Q. 12. Please look at the bottle and state whether or not this is a bottle of Hunyady Matyas water, with a red and blue label, and the Seal Brand label thereon.
A. Yes.
Q. 13. Did you also in the same month go to the drug store of Flaks & Gordon, at No. 440 Market street, in this city?
158 A. Yes.
Q. 14. Now please state what you demanded of the druggist whom you found there?
A. A bottle of Hunyadi Janos water.
Q. 15. And what did you get?
A. He wrapped up a bottle in a paper, and I paid him 25 cents for it. I received a receipt and his card.

By Mr. COE:

Q. 19. What did he say he asked for?
A. The Hunyadi Janos. He asked me if it was the first time I got a bottle in his place, and I told him no.

By Mr. KNAUTH:

Q. 20. Can you produce the bottle which you received on that occasion?
A. Yes, sir; there was a top on it that don't belong to the bottle.
Q. 21. By top, you mean a capsule?
A. Capsule; yes.
Q. 22. What was that capsule?
A. It was a different capsule on it; Matyas was the water, and there was a different capsule on it.

Q. 23. I notice that on the bottle which you have referred to, the name Hunyady Lajos appears on the capsule

A. Yes, sir; it was a different capsule there. It was very funny, because I remember the case, the capsule was different from the label that was on it.

Q. 24. Is the bottle which I now show you the bottle which you purchased of Flaks & Gordon?

A. Yes.

Mr. KNAUTH: I offer that for identification.

(Bottle marked "Saxlehner *vs.* Eisner & Mendelson Company, Ostermann, No. 2, J. A. S."

Mr. COE: The testimony of this witness with regard to the purchase of the said bottle, and the whole thereof, from Flaks & Gordon objected to by counsel for defendant as irrelevant,
159 immaterial and incompetent, for the reason that the same is not connected in any way with any of the defendants in the above-entitled suit.)

Q. 25. Please look at the bottle which you bought of Flaks & Gordon and state whether or not it bears the red and blue label of the Hunyady Matyas water, and with the Seal brand of the Eisner & Mendelson Company?

A. Yes.

(Mr. COE: Question objected to, for the reason that the brand itself is the best evidence, and the same has not been introduced in evidence, but has been marked for identification.

Complainant's counsel now offers the bottle in evidence.

Defendant's counsel objects to the introduction of such bottle hitherto marked for identification, on the ground that the same is incompetent, irrelevant and immaterial to any of the issues in this cause, for the reasons given in his previous objection to the testimony of this witness so far as relates to the purchase of this bottle from Flaks & Gordon.)

Cross-examination by Mr. COE:

Cross-Q. 26. You say that you purchased the bottle of Hunyady Matyas water of Rudolph Gies at the request of Kalman Saxlehner; how did he request you to make such purchase?

A. He says, "Go there and ask for a bottle of Hunyadi water with the red diamond."

Cross-Q. 27. Did you have any arrangement with him by which he was to pay you for so going?

A. No.

Cross-Q. 28. How did you happen to go then?

A. A friend of mine who was working there with him, a young fellow, and he told me so and so.

Cross-Q. 29. Who was this young fellow that told you?

A. His name is Erickson; he was in the office; he was there in the office.

Cross-Q. 30. Then I understand you to say that Mr. Saxleh-
160 ner did not personally ask you to make this purchase, but that a man——

A. From his office.

Cross-Q. 31. In Mr. Saxlehner's office requested you to make such purchase?

A. Yes.

Cross-Q. 32. What did he say to you?

A. He told me to go there and say if I ask for a red-diamond bottle of Hunyadi water—red diamond; some false things getting out there; they ordered stuff out for Hunyadi water; I shall try and get one.

Cross-Q. 33. Did he promise to pay you for doing this work?

A. Not directly pay me for it; he says, maybe I can do some business with that fellow, job or something like that.

Cross-Q. 34. Did you receive any compensation, either before or after, for buying this bottle?

A. No, sir.

Cross-Q. 35. Or other bottles?

A. No, sir.

Cross-Q. 36. Then, I understand you to say that this Erickson promised you to compensate you for buying this bottle, or give you a job, or make it worth your while?

A. Yes.

Cross-Q. 37. But that he did not keep his promise; is that correct?

A. Not keep his promise? He did not keep his promise so far, because he told me it was all right; he would see me afterwards.

Cross-Q. 38. Did he see you afterwards?

A. No.

Cross-Q. 39. Then, after promising to see you afterwards, did I understand you to say that he did not so see you?

A. I don't know what you mean by it, by seeing me.

Cross-Q. 40. I only quote your own expression, where you say in your previous answer that he promised to see you afterwards,
161 and as I understand you to say, did not so see you; therefore, I don't understand why you now say you don't know what I mean by my last question. Do I now understand you to say that after promising to see you, he did not see you?

A. That has got nothing to do with this case. I bought this bottle in the store; it has nothing to do with this, whether he see me or not. I was there and got this bottle of Hunyadi Janos; I asked for the real stuff and they gave me false. That is all.

Cross-Q. 41. Is there anything that you are ashamed of with reference to any arrangement you had with Mr. Erickson or Mr. Saxlehner, that you have answered in the way you have answered to my questions?

A. No.

Cross-Q. 42. Now, I ask you directly whether you were not employed under some arrangement, direct or indirect, that you would be paid for your services in going to Mr. Gies' place or other places,

and buying bottles of Hunyadi water under their direction, or at their request?

A. Certainly, he would pay me my expenses what I had if I did that for him. He could not expect that for nothing. I was not employed there—I was not employed in his house. He said he would make the expenses all right, because he could not expect me to work for nothing.

Cross-Q. 43. Then, I understand you to say that you were paid for your services in buying this Gies bottle and the other bottle that you said you purchased?

A. Expenses, and because the young fellow told me he would pay the expenses what I have for the trouble for the lost time I had certainly. I ain't connected with the firm at all.

Cross-Q. 44. Then, I understand you, you were both paid for your expenses and for your trouble and time in buying these bottles?

A. Yes.

Cross-Q. 45. You said that you bought this Gies bottle in the month of February, 1897; can you state what part of the month you so bought it?

162 A. In the first part of the month.

Cross-Q. 46. Can you state the exact date in February in the first part of the month?

A. No, I could not tell the exact date (referring to memorandum). It was the first part of February, I am sure.

Cross-Q. 47. But you cannot tell what exact day of the first part of February it was; am I correct?

A. I did not put the date down.

Cross-Q. 48. You made no memorandum of the exact date—is that right?

A. Yes.

Cross-Q. 49. Was it within the first five days of February?

A. Yes, sir.

Cross-Q. 50. Some day between the first and the fifth?

A. Yes, sir; I am sure.

Cross-Q. 51. You are sure of that, are you?

A. Yes, sir.

Cross-Q. 52. Who sold you this bottle and gave you the receipt; was it Mr. Gies himself?

A. A young man that was in the store.

Cross-Q. 53. You don't know whether this young man was Mr. Gies himself or not?

A. No; I don't know him.

Cross-Q. 54. Please describe the appearance of this young man who sold you the bottle and who signed the receipt?

A. A young man about eighteen or twenty years old, I guess.

Cross-Q. 55. What kind of hair?

A. A blond man.

Cross-Q. 56. Tall or short?

A. He was a middle-sized man.

Cross-Q. 57. Did he have a moustache or was he smooth-faced?
A. I guess he had a little moustache.

BERNHARD OSTERMANN.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

163 SAMUEL GINSBURG, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Give us your name, age, residence and occupation.
A. Samuel Ginsburg; twenty-five; reside in New York city; picture frames.
Q. 2. Did you ever at the request of Mr. Kalman Saxlehner go to the drug store at the corner of West Broadway and Bleecker street, New York city, to purchase a bottle of Hunyadi Janos water?
A. Yes, sir.
Q. 3. Do you remember when it was?
A. I do not exactly.
Q. 4. In what month?
A. I think it was in August.
Q. 5. August of last year?
A. 1896; I am not exactly positive whether it was in August or not.
Q. 6. Do you remember what the name of the drug store was, or the name of the druggist?
A. I ain't got it exactly in my mind.
Q. 7. What did you demand?
A. I demand for one bottle of Hunyadi Janos.
Q. 8. Did you give the druggist a slip of paper?
A. Yes, I did, a slip of yellow paper.
Q. 9. Is this the slip which I now show you?
A. Yes, sir; that is the one.
Q. 10. Containing the words in pencil "One bottle of Hunyadi Janos"?
A. Yes.
Q. 11. What did you get?
A. I got one bottle of Matyas.
Q. 12. How did you get it—did the druggist wrap it up?
A. Yes, sir; he did.
164 Q. 13. Did he show it to you before he wrapped it up?
A. He did not show it.
Q. 14. Did you pay him for it?
A. Yes, I did; I paid him 25 cents.
Q. 15. Did you bring this bottle to this office here afterwards?
A. No, sir; I brought it up to Mr. Saxlehner, up in his office.
Q. 16. Did you afterwards make an affidavit with reference to that purchase?
A. Yes, I did; yes, sir.

Q. 17. I show you the affidavit which you made; is this the affidavit which you then made?

A. Yes, sir; that is mine.

Q. 18. Is that your signature?

A. Yes, sir; that is my signature.

Q. 19. Look at this affidavit; does that refresh your memory with reference to the date when you made this purchase?

A. Yes, sir.

Q. 20. When was it?

A. It was in February; I could not tell exactly what date it was.

Q. 21. You can't tell now from memory what date it was?

A. No, sir; I cannot.

Q. 22. It was in February, 1897?

A. Yes.

Q. 23. Is the bottle which you obtained on that occasion a bottle of Hunyady Matyas water with the blue and red label and the Seal brand of the Eisner & Mendelson Company?

A. Yes.

Q. 24. How much did you pay for it; do you remember that?

A. 25 cents I paid.

(Complainant's counsel offers in evidence the slip produced by the witness.

Slip marked "Saxlehner *vs.* Eisner & Mendelson Company, Complainant's Exhibit Ginsberg Paper, J. A. S.")

165 Cross-examination by Mr. COE:

Cross Q. 25. You say you made the purchase at this drug store you speak of, at the request of Kalman Saxlehner; how did he request you to make it?

A. He told me to go up there with the slip of paper, and just to show him the slip of paper and ask what it calls for, and by doing so I went into the drug store and got a bottle of Matyas.

Cross-Q. 26. And when did you do this?

A. It was in February 15, 1897.

Cross-Q. 27. But you stated on direct examination that it was in August, 1896, that you did this; how is that?

A. It came in mind something like this, the wrong time; I had something in mind of buying something in a drug store; that was in August, but when I seen the bottle it was the right time, February 15, 1897.

Cross-Q. 28. Did you present this yellow paper?

A. Yes, sir; I did.

Cross-Q. 29. With the words "One bottle Hunyadi Janos" on it?

A. Yes, sir.

Cross-Q. 30. And are the words "One bottle Hunyadi Janos" in your handwriting?

A. It is not in my handwriting.

Cross-Q. 31. In whose handwriting is it?

A. I got this from the office of Mr. Kalman Saxlehner.

Cross-Q. 32. Then, as I understand you, this yellow paper was given you with the writing on, "One bottle Hunyadi Janos"?

A. Yes, sir.

Cross-Q. 33. And as I understand you, you presented this yellow paper to the person in charge at this drug store?

A. Yes, sir.

Cross-Q. 34. On the 15th of February, 1897?

A. 1897.

166 Cross-Q. 35. What time of the day was this?

A. It was in the evening.

Cross Q. 36. What time in the evening?

A. Well, I could not tell exactly, but I think it was about eight o'clock; I could not tell exactly the time when it was.

Cross-Q. 37. Who was the person that waited on you?

A. It was a man.

Cross-Q. 38. Go on and describe him.

A. I could not tell exactly how the man looked like; I am not sure and positive how the man was; I think the man wore a red beard, if I am not mistaken, for I did not take notice of the man at that time; I did not know if it was necessary.

Cross-Q. 39. How many attendants were there in the drug store at that time?

A. There was a woman alongside of him, and the druggist and me.

Cross-Q. 40. Was this woman an employee?

A. I could not tell, sir; I demanded of the man for a bottle when I showed him the slip of paper, and he gave it to me.

Cross-Q. 41. You don't know whether this woman was an employee or not?

A. No, sir.

Cross-Q. 42. And you are not sure whether any woman was there or not?

A. I am sure a woman was there.

Cross-Q. 43. So that I understand you at the time, on the 15th of February, when you went to this drug store and made this purchase, there were only three persons, at about eight o'clock in the evening—there were only three persons who were present—yourself, this woman you speak of whom you don't know was an employee or not, and the person who waited on you, and whom you have described as a man with a reddish beard, am I correct?

A. Yes, sir.

167 Cross-Q. 44. What sort of a looking man otherwise was this man with the red beard who waited on you?

A. He was not tall; he was a small man.

Cross-Q. 45. Were you paid for your time and trouble in going and making this purchase?

A. Yes, sir; for that time.

Cross-Q. 46. You were paid by Mr. Saxlehner or by some person in his employ?

A. Mr. Kalman Saxlehner direct; he paid me.

Cross-Q. 47. Did you deliver this yellow paper with the words

"One bottle Hunyadi Janos" on it to this young man with the reddish beard who waited on you?

A. Yes, sir.

Cross-Q. 48. You gave it personally to him, did you?

A. Yes, sir.

Cross-Q. 49. How does it happen that it is here today, then?

A. I asked him for the slip of paper, to return it to me, because I want to have the slip of paper for a memorandum some other time.

Cross-Q. 50. And on this request, do I understand you to say he gave it back to you?

A. Yes, sir.

Cross-Q. 51. Without marking anything on it?

A. Without marking anything on it.

Cross-Q. 52. And this slip of paper is in the same condition——

A. Yes, sir.

Cross-Q. 53. Wait a minute—as when you presented it, and when he gave it to you back after presentation, as you say, at your request?

A. Yes, sir; it was the same.

Redirect examination by Mr. KNAUTH:

Redirect Q. 54. Did it make any difference to you as to whether you obtained upon this purchase a bottle of Hunyadi Janos or anything else?

168 A. Only Hunyadi Janos.

Redirect Q. 55. Your instructions were simply to go there and purchase what was on the slip?

A. Yes, sir; one bottle of Hunyadi Janos.

Redirect Q. 56. Did you see before you received that bottle what it was that the druggist wrapped up?

A. No, sir, I did not.

Recross-examination by Mr. COE:

Recross-Q. 57. Did you see any bottles of Hunyadi Janos there at the store?

A. I could not tell you; I didn't took no notice.

Recross-Q. 58. Do you know Hunyadi Janos water when you see it?

A. Yes, I do.

Recross-Q. 59. When you presented the paper to this young man whom you say waited on you, what did you say?

A. I asked him if he would be so kind as to give me one bottle of Hunyadi Janos, as it says on the paper.

Recross-Q. 60. Didn't you say you wanted a bottle of Hunyadi water?

A. I said Hunyadi Janos.

Recross-Q. 61. You are sure you didn't ask for Hunyadi water?

A. No, sir, I did not; I told him Hunyadi Janos, as it was on the paper.

Recross-Q. 62. And you swear that you asked him for a bottle of Hunyadi Janos water and not Hunyadi water?
A. Yes, sir; I swear that.
Recross-Q. 63. And you swear that positively?
A. Yes, sir.

SAMUEL GINSBURG.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

169 SAMUEL SHULMAN, called and sworn as a witness on behalf of the complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. State your age, your residence and your occupation.
A. I am twenty-five years old; 21 Avenue A; I used to be—my business used to be at 20 Catharine street; now it is 21 Avenue A.
Q. 2. New York city?
A. Yes, sir.
Q. 3. What is your occupation?
A. I am in the picture-frame business.
Q. 4. Did you ever go to the drug store of Louis Marquet at the corner of Bleecker street and West Broadway to purchase a bottle of mineral water?
A. Yes, sir.
Q. 5. At whose request did you go?
A. Mr. Saxlehner.
Q. 6. When was it?
A. I cannot tell you the month, but I can tell you the date; it was the 11th.
Q. 7. Was it this year?
A. Yes, sir.
Q. 8. Was it in the early part of the year?
A. In the first part of the year.
Q. 9. Now, what did you demand when you went to the drug store?
A. I handed him a slip of paper on which it was put down "One bottle of Hunyadi Janos;" I gave him that paper and he went to his window and took out a bottle of water and wrapped it up in a yellow paper and handed it to me and I paid him twenty-five cents.
Q. 10. What did you do with the bottle?
A. I took the bottle and took the slip of paper back again—as soon as he went to wrap up the bottle, I took the slip back
170 again and put it in the wrapper and I went to Mr. Saxlehner and handed it to him, and showed him the slip of paper which I asked him, and I got that bottle and I gave it to him.
Q. 11. Was the slip of paper lying on the counter while he was wrapping up the bottle?
A. Yes, sir.

Q. 12. And you took it back with you?
A. Yes, sir.
Q. 13. Did you afterwards mark the bottle which you purchased?
A. Yes, sir.
Q. 14. Did you also mark the wrapper of brown paper or yellow paper in which you obtained it?
A. Yes, sir.
Q. 15. Now, look at this bottle and this wrapper which I show you and tell us whether you recognize the bottle and the wrapper?
A. Yes; this is my name.
Q. 16. On the wrapper?
A. Yes, sir; "S. S., No. 216;" that is what I marked it.
Q. 17. Now, look at the bottle, please, and state whether you recognize your marks there?
A. Yes; "S. S., No. 217;" that is also my own handwriting.
Q. 18. Is that the bottle of Hunyady Matyas water with the red and blue label and the Seal brand of the Eisner & Mendelson Company?
A. That is what it is.
Q. 19. Is that the bottle which you purchased on that occasion?
A. Yes, sir.
Q. 20. Now, look at this slip of paper and say whether or not that is the slip of paper to which you have testified?
A. Yes, sir; this is the slip of paper.
Q. 21. Did you mark this also?
A. Yes, sir; that is "S. S., No. 215."
171 Q. 22. How much did you pay for it?
A. Twenty-five cents.
Q. 23. Did the druggist show you the bottle before he wrapped it up?
A. No, sir; he handed me the bottle; it was wrapped up already.
Q. 24. Did you find any name inscribed on the drug store?
A. The name from the drug store was "Pharmacy Italiana."
Q. 25. Was it not "Farmacia Italiana"?
A. Yes, sir.
Q. 26. Did you get a receipt from the druggist?
A. I asked him for the receipt and he put down on the wrapper over the bottle twenty-five cents.
Q. 27. That was all that he wrote out as a receipt?
A. Yes, sir.

(Complainant's counsel offers in evidence the slip of paper to which the witness has referred.
The slip is marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit Shulman Paper, J. A. S., ex'r.")

Q. 28. Did you make an affidavit to this purchase at or about the time when you had made it?
A. Yes, sir; a day or two.
Q. 29. A day or two later?
A. Yes.
Q. 30. Look at this paper which I now show you and state

whether it refreshes your memory with reference to the day when you made the purchase?

A. I made this on the day after I got that bottle.

Q. 31. I notice that this was sworn to on February 15, 1897. Is that your signature to the affidavit?

A. Yes, sir; that was sworn, because at that time when that young man made out that affidavit so, I could not wait; I had to go home, and I promised to be the same day back again, but I did not come the same day, and I came a few days later, and I signed it later than it was made out.

172 Q. 32. This affidavit states that you made the purchase on the 12th of February?

A. Yes.

Q. 33. Was that the day when you went there?

A. Yes, sir.

Q. 34. Now, state whether on the same day or about the same time you went also to the drug store of Rudoiph Gies, at 396 Third avenue, New York city?

A. Yes, sir.

Q. 35. Did you make a purchase of mineral water there?

A. Yes, sir.

Q. 36. Do you remember what day it was?

A. I do not exactly, but it was in the night-time, about half past ten in the night.

Q. 37. Was it about the same time you made the other purchase?

A. It wasn't the same time, but I cannot exactly remember it was the same day, but it was on the same week.

Q. 38. What did you ask for when you went into that drug store?

A. I handed him a slip of paper and I asked him for Hunyadi Janos red diamond.

Q. 39. What did you get?

A. Hunyady Matyas.

Q. 40. Did the druggist show you the bottle before he wrapped it up?

A. No, sir.

Q. 41. How much did you pay for it?

A. I think I paid eighteen cents for it.

Q. 42. Did you get a receipt?

A. He marked it on the slip of paper.

Q. 43. Is this paper the receipt which you got from Mr. Geis (handing witness paper)?

A. Yes, sir.

(Complainant's counsel offers the receipt in evidence.

173 The receipt is marked Saxlehner *vs.* Eisner & Mendelson Co., "Complainant's Exhibit Geis Receipt, J. A. S. ex'r.")

Q. 44. Is this the bottle which you got from Mr. Geis on this occasion (handing witness bottle)?

A. Yes, sir.

Q. 45. That is also a bottle of Hunyady Matyas water with the

blue and red label and the Seal brand of the Eisner & Mendelson Company?

A. Yes, sir.

Cross-examination by Mr. COE:

Cross-Q. 46. What time was it on the 12th of February that you presented this white paper marked Shulman paper at the Italian pharmacy; what time of day was it?

A. It was in the afternoon about three o'clock.

Cross-Q. 47. Who waited on you—what sort of a looking man was it that waited on you?

A. It was a man with red hair; I cannot tell you exactly whether he had a beard or not, but he had red hair.

Cross-Q. 48. Was he tall or short?

A. Short.

Cross-Q. 49. How many people—how many employees were in this drug store at this time?

A. There was a woman and the employee and me.

Cross-Q. 50. Was the woman an employee?

A. The woman I think is the wife of the proprietor from the pharmacy.

Cross-Q. 51. Was it the proprietor that waited on you?

A. I know the boss; I know it was not the boss, but it was an employee.

Cross-Q. 52. The boss was not there at this time?

A. No, sir.

Cross-Q. 53. Will you swear positively you did not see the bottle before this young man wrapped it up?

A. Yes, sir.

174 Cross-Q. 54. Who wrote on this paper "One bottle Hunyadi Janos"?

A. Mr. Ginsburg, this gentleman (indicating Mr. Ginsburg).

Cross-Q. 55. Do you mean Mr. Ginsburg that has just testified?

A. Yes, sir.

Cross-Q. 56. What did he say to you when he wrote it?

A. He wrote it out and said "Here is a slip of paper which you have got to ask for."

Cross-Q. 57. And did you get back this slip of paper?

A. He went to the window and he gave me that bottle (indicating); it was wrapped in a yellow paper; he went and wrapped it in a white paper and at the time he wrapped it in I took the slip back.

Cross-Q. 58. What did you say—ask for the slip of paper?

A. I did not ask him for the slip; I took it right back; he left it on the table.

Cross-Q. 59. You say he had left it on the table and you took it?

A. Yes, sir.

Cross-Q. 60. Did he see you take it?

A. Yes, sir.

Cross-Q. 61. Did he say anything when he saw you take it?

A. No, sir.

Cross-Q. 62. When you presented this white slip of paper did you say anything to him?

A. I told him I wanted to have a bottle of Hunyadi Janos water.

Cross-Q. 63. Are you sure you said Hunyadi Janos and not Hunyadi water?

A. Yes, I am sure.

Cross-Q. 64. Absolutely so?

A. Yes, sir.

Cross-Q. 65. How far away was this woman you speak of as being present when you asked this young man—when you so asked this young man as you say?

175 A. She stood not far from me.

Cross-Q. 66. And could she hear the conversation?

A. I think so.

Cross-Q. 67. You were paid for your so going to this place, were you not?

A. I was paid for the twenty-five cents, whatever I paid for.

Cross-Q. 68. And nothing paid for your time and trouble in going to the place?

A. No, sir.

Cross-Q. 69. How did you happen to go then?

A. Mr. Saxlehner was a customer of ours, and we make frames for his signs, so once he asked me if I will go and buy him a bottle of water; so I said yes.

Cross-Q. 70. Who waited on you at the Geis store when you went there—what sort of a looking man?

A. He had a full beard; a short man.

Cross-Q. 71. Was he the proprietor?

A. I cannot tell you, sir.

Cross-Q. 72. How many people were there when you made this purchase?

A. The man who gave me the bottle and another man stood there. I asked him for a bottle of Hunyadi Janos water, red diamond; so he said that it used to be a water by the name of Red Diamond; they had a combination; that is what he told me; now he said all the bottles are the same thing—so he says; I told him "Mr. Geis, I want to have what is put down on this paper; I don't know about anything else whatever it is;" so he went to the window and took out a bottle and wrapped it up in the paper and gave it to me; there was a man there present.

Cross-Q. 73. What was put on the paper was only "One bot. Hunyadi"?

A. "One bottle Hunyadi Janos."

Mr. KNAUTH: That is the receipt you have got; that is not the paper.

Cross-Q. 74. Where is the paper that you gave him?

176 A. The paper I brought along I gave it to Mr. Saxlehner.

Cross-Q. 75. Where is the paper?

A. There it is over there (indicating paper on the table); that is the receipt what I brought back for the bottle.

By Mr. KNAUTH:

Cross-Q. 76. Is this the slip you handed to him?

A. The slip I handed him was put down "One bottle Hunyadi Janos, red diamond."

By Mr. COE:

Cross-Q. 77. What I show you now is a slip of pink paper here having the words, "One bottle Hunyadi, 18 cents."

A. It was a red paper what I gave it to him, and I asked him for a receipt, and he put down on the red paper "18 cents for one bottle Hunyadi Janos."

Cross-Q. 78. So there were two papers?

A. Yes.

Cross-Q. 79. What has been produced here has been only the receipt which he gave?

A. Yes.

(Complainant's counsel states he is not in possession of the paper referred to by the witness as having been handed by him to Geis.)

Cross-Q. 80. The paper which I now show you (which is a pink paper) marked "Geis receipt" is the paper that was annexed to your affidavit made on the 13th day of February, with reference to the Geis purchase on the 11th of February, is it not?

A. Yes; that is the paper; this is the receipt which I brought back.

Cross-Q. 81. You got this Geis bottle in the evening about half past ten, did you not?

A. Yes, sir.

Cross-Q. 82. Of the 11th of February?

A. Exactly the day I don't remember, but it was half past ten at night.

177 Cross-Q. 83. I see by the affidavit from which this pink paper was taken today to be put in evidence by complainant's counsel, that you state you made this purchase on the 11th of February, 1897; is that correct?

A. I cannot tell you exactly if it is correct; it is on the 11th, because I don't remember that.

Cross-Q. 84. But at any rate, whether it was the 11th or 12th of February you made this purchase; it was in the evening at half past ten o'clock or thereabouts?

A. Yes, when I got that bottle.

Cross-Q. 85. Please state who was present at the time you made this purchase at the Geis store on the 11th or 12th of February, at about half past ten in the evening.

A. There was a man present.

Cross-Q. 86. Was it Mr. Geis himself, do you know?

A. I couldn't tell you, sir.

Cross-Q. 87. Was this man the only person present when you so made the purchase?

A. That man and another man was in there.

Cross-Q. 88. What sort of a looking man was this other man?
A. Black-looking hair.
Cross-Q. 89. Smooth face, or otherwise?
A. Not smooth face.
Cross-Q. 90. Full beard?
A. Not a beard at all; he had a smooth face; he had no beard. Now I understand what you mean.
Cross-Q. 91. Was he an employee?
A. No, sir.
Cross-Q. 92. How do you know he was not an employee?
A. He spoke there with him about some private business.
Cross-Q. 93. Do you know who he was?
A. No, sir.
Cross-Q. 94. Was he near enough to hear your conversation with the man from whom you purchased this bottle?
A. Yes, sir.
178 Cross-Q. 95. Do you know whether he did overhear it or not?
A. I am sure he heard it.

SAMUEL SHULMAN.

Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

Adjourned to Thursday, September 16, 1897, at 11 a m.

NEW YORK, *September* 16, 1897.

Met pursuant to adjournment.
Present: Counsel as before.

It is admitted by defendant's counsel that a circular such as produced by complainant's counsel was sent to the various defendants in the latter part of October, 1896.

This stipulation is to cover also the Weeks & Potter case, Weeks & Potter Company receiving also a copy of the circular.

Complainant's counsel offers in evidence the circular produced by him.

Circular marked "Saxlehner & Mendelson Company, Complainant's Exhibit Circular of Notice, J. A. S."

Defendant's counsel, while admitting that said circular was sent to the various defendants herein, objects to the same as immaterial and irrelevant to any of the issues in this case.

Complainant's counsel offers in evidence the two bottle exhibits, heretofore marked Exhibit A for identification, and Exhibit B for identification.

Bottles marked "Saxlehner against Eisner & Mendelson Company, Complainant's Exhibits A and B, J. A. S.," respectively.

Defendant's counsel admits that prior to the commencement of this suit, the defendant Eisner & Mendelson Company have sold in the southern district of New York Hunyady Matyas
179 water in similar bottles and in like capsules and labels to those shown on said Exhibits A and B.

Complainant's counsel reads in evidence a letter addressed to the defendant Eisner & Mendelson Company by Briesen & Knauth, complainant's solicitors, under date of October 12, 1896, which is as follows:

"NEW YORK, *Oct.* 12, 1896.

Eisner & Mendelson Company, 152 Franklin street, city.

GENTLEMEN: We are instructed by the firm of Andreas Saxlehner, of Budapest, Hungary, to notify you that by selling and introducing into the market of this country certain bitter waters containing the name Hunyadi, you have violated the trade-marks of that firm of Andreas Saxlehner, and are still violating the same. The manner in which the labels of the bottles containing the term 'Hunyadi' are arranged by you, moreover, is in such close imitation of the genuine Saxlehner labels that this notice is to apply not only to the term Hunyadi and to the term Hunyadi Janos, but also to the general style of the labels employed by you. Unless we learn within a week that you are ready to recognize the above-indicated rights of our client, and ready to make restitution for past infringements of those rights, we will bring suit against you to restrain future infringements, and to insure an accounting for the past.

Yours respectfully, BRIESEN & KNAUTH."

Mr. COE: It is hereby admitted that the Eisner & Mendelson Company received the original letter, of which the above is a copy, on or about October 12, 1896, but the contents of said letter *is* objected to as immaterial and irrelevant by defendant's counsel.

Complainant's counsel offers in evidence a certificate of the municipal council of Buda, together with a translation into English thereto attached, dated January 19, 1863, providing for a license to Andreas Saxlehner to sell the water of his spring Hunyadi, under that name.

180 Paper marked "Saxlehner *vs.* Eisner & Mendelson Company, Complainant's Exhibit 1863 Certificate, J. A. S."

Complainant's counsel further offers in evidence a certificate of the chamber of commerce and industry of Budapest, dated August 8, 1891, certifying to the registration of the trade-mark "Hunyadi Janos" by Andreas Saxlehner, at Budapest, on December 12, 1873, and translation annexed thereto.

Paper marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit Certificate of 1891, J. A. S."

Complainant's counsel offers in evidence another certificate of the Budapest chamber of commerce and industry, dated May 12, 1892, relating to the registration of the trade-mark "Hunyadi Janos," together with translation thereto attached.

Paper marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit Certificate of 1892, J. A. S."

Complainant's counsel further offers in evidence a certificate of the Budapest chamber of commerce and industry, together with a translation thereto attached, dated October 6, 1896, and relating to the trade of complainant.

Paper marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit Certificate of Ownership of Firm, J. A. S."

Complainant's counsel also offers in evidence a certificate of the mayor's office of Budapest, together with a translation thereto attached, relating to the domain owned by Andreas Saxlehner at Budapest.

Paper marked "Saxlehner *vs.* Eisner & Mendelson Company, Complainant's Exhibit Certificate of Ownership, J. A. S."

Complainant's counsel further offers in evidence certificate of the Budapest chamber of commerce and industry as to the registration of Andreas Saxlehner's red and white Hunyadi Janos label on July 14, 1890, together with the translation thereto attached.

Paper marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit New Registration Certificate, J. A. S."

181 Complainant's counsel further offers in evidence certificate of the Budapest chamber of commerce and industry, dated May 10, 1892, as to the registration of three Hunyadi Janos labels used by Andreas Saxlehner in his business, with the Apollinaris Company, Limited, the first being a red and white label, and the other two being red and blue labels like the label on bottle "Complainant's Exhibit Former Bottle."

Paper marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibit Label Transfer Certificate, J. A. S."

(Counsel for defendant reserves the right to object to the translations of the above documents, introduced in evidence by complainant's counsel, if the same, on comparison with the originals, are found to be incorrect translations.)

TITO TOSCANI, called on behalf of the complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. Tito Toscani; twenty-seven years; address, 9 West Twenty-eighth; salesman.

Q. 2. In whose employ are you now?

A. I am on my own account.

Q. 3. Were you ever employed by Mr. Kalman Saxlehner to make certain inquiries about the sale of Hunyadi Janos water?

A. Yes.

Q. 4. When was that?

A. During July and September, 1896.

Q. 5. How long have you known the Hunyadi Janos water?

A. Ten years.

Q. 6. Have you used it yourself?

A. Yes.

Q. 7. Now will you please state where you made those inquiries that you have testified to?

182 A. Massachusetts, Connecticut, New York State.

Q. 8. What did you do to make those inquiries?

A. I went into various drug stores and asked for Hunyadi and

Hunyadi Janos, and Hunyadi with the red diamond and Hungarian bitter waters.

Q. 9. Can you state how many or about how many drug stores you visited on these occasions?

A. About two hundred.

Q. 10. Did you on these occasions find in the market the defendant's Hunyady Matyas water, and also the Hunyady Lajos water, which has been here before us?

A. Yes, on a good many occasions.

Q. 11. Now please state what experiences you had in making these inquiries in July and September of last year?

A. I visited the various stores, and asked if they kept Hunyadi water, and they would explain to me that—have I got to give every one of them?

Q. 12. Just give it in your own way, and we will find out in the course of time what we want and what is valuable for us.

A. I inquired for Hunyadi water and would get handed to me in some of the stores Hunyady Lajos or Hunyady Matyas or other imitations. For instance, I visited the drug store——

Mr. Coe: The words "other imitations" are objected to as improper characterization.

Q. 13. Now go right on.

A. I visited the drug store of Paul Treutler, and handed him a piece of paper on which was written "One bottle Hunyadi Janos water." He handed me a bottle which proved afterwards to be a bottle of Hunyady Lajos water, and also signed my paper with the name "Paul Treutler," and "25 cents." I had the same experience in Flaks & Gordon. On one occasion I went and inquired for a bottle of Hunyadi red diamond and received a bottle of Hunyady Matyas Seal brand. On my trip to Boston I went to the
183 wholesale drug store of Weeks & Potter, 360 Washington street, January 12, and ordered a dozen bottles of Hunyady Matyas, and a dozen bottles of Hunyady Lajos, for which I paid $4.12, and they handed me a receipt. I marked three of each of the bottles "1/12/97 T. T. Weeks & Potter."

Q. 14. Did you find that the Weeks & Potter Company had those waters, the Hunyady Matyas water, and the Hunyady Lajos water, in stock for sale?

A. Yes.

By Mr. Coe:

Q. 15. That was in July or September?

A. January 12, 1897.

By Mr. Knauth:

Q. 16. Are the bottles which I now show you, one being a bottle of Hunyady Lajos and the other a bottle of Hunyady Matyas water some of the bottles purchased by you from the Weeks & Potter Company in Boston, as stated by you?

A. Yes.

(Complainant's counsel offers the bottles in evidence. Bottles marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibits Weeks & Potter Bottles Nos. 1 and 2, J. A. S.," respectively.

Q. 17. Now, will you tell us something more about your visits?

A. I also visited wholesale houses in Philadelphia—I have not the name, and inquired if they had any Hunyadi Hungarian bitter waters, and they showed me their price-list, saying that they had Hunyadi Janos and Hunyady Matyas, Hunyady Lajos and Hunyady Apenta.

Q. 18. Can you state what your general experience was in visiting drug stores in the States named by you, as to your getting mineral water in answer to a request for Hunyadi water—what would you get?

184 A. If I went into the better neighborhood, more expensive drug stores, they would always give me the Hunyadi Janos, saying that that was the only genuine water.

Q. 19. Was that mostly your experience?

A. That was mostly my experience.

Q. 20. Can you state approximately in how many cases you obtained Hunyadi Janos as compared with those cases where you would obtain something else?

A. I should say about four cases out of ten. You see I visited mostly poor neighborhoods, where they would always hand me some of the imitations.

Q. 21. In speaking of some imitations, are you also referring to other waters than the Hunyady Matyas and the Hunyady Lajos water?

A. In a very few cases, but it was mostly Hunyady Matyas and Hunyady Lajos.

Q. 22. Were those waters, the Hunyady Matyas and Hunyady Lajos, sold at the same price as the Hunyadi Janos?

A. In some cases, yes, but in other cases there was a distinction made, and often asked if you would prefer the cheaper or the more expensive brand of Hunyadi water.

Q. 23. What were meant by the cheaper brands?

A. Why, the Hunyady Lajos and the Hunyady Matyas.

Q. 24. And how much less did you pay for those waters than the Hunyadi Janos?

A. I would pay twenty-five cents for the Hunyadi Janos and I would pay all the way from sixteen to nineteen cents for the Hunyady Lajos and Matyas.

Q. 28. Do you know at what prices the Hunyady Matyas water is sold to druggists?

A. At wholesale?

Q. 29. Yes.

A. Six dollars to seven dollars a case of fifty bottles.

Q. 30. Do you know at what price the Hunyady Lajos is sold to druggists?

A. Six dollars to $6.50. The Maytyas was always a little
185 higher than the Lajos. The Hunyady Matyas is $6.50 to $7.00, and the Hunyadi Janos $9.75 to $11 according to the quantities.

Q. 31. And these prices relate to cases of fifty bottles each?

A. Yes.

Q. 32. Did you know anything about those waters which you have styled as imitations prior to the summer of 1896 when you made this trip?

A. No, I never had heard of them. I had often bought the Hunyadi Janos, and might have received the Hunyady Matyas or the Hunyady Lajos, but I would not have known the difference, the labels and bottles being so similar to the Hunyadi Janos.

Mr. COE: The last clause of the answer is objected to as irresponsive and immaterial.

Q. 33. Did you make any purchases of the Siegel-Cooper Company in this city?

A. Yes. I went to the store of Siegel & Cooper on January 22 and purchased two bottles from a girl, one of Hunyady Matyas and one of Hunyady Lajos. They had large signs up "Hunyadi water." The Matyas label had a No. 3 on it. I marked the bottles for identification "T. T. 123."

Q. 34. How much did you pay for them?

A. I forget that; seventeen and nineteen cents.

Q. 35. Per bottle?

A. Per bottle.

Q. 36. Are the bottles which I now show you some of the bottles of Hunyady Matyas and Hunyady Lajos water which you purchased of the Siegel-Cooper Company on that occasion?

A. Yes.

(Complainant's counsel offers the two bottles in evidence.

Bottles marked "Saxlehner *vs.* Eisner & Mendelson Co., Complainant's Exhibits Siegel-Cooper Bottles 1 and 2, J. A. S., ex'r," respectively.)

Q. 37. Did you ascertain in your intercourse with the druggists whether or not the sale of the Hunyady Lajos and Hun-
186 yady Matyas waters had had any effect upon the sale of the Hunyadi Janos water?

A. Yes; directly they came into the market, the sale of the Hunyadi Janos water fell off, as no profit could be made at the figures they had to sell to meet the unscrupulous druggists who sold the Hunyady Lajos and Hunyady Matyas as Hunyadi water, at a lower figure.

Direct examination closed.

No cross-examination.

TITO TOSCANI.

(Adjourned till Friday, September 17, 1897, at 2 p. m.)
Sworn to before me—

GILBERT E. ROGERS,
Notary Public.

NEW YORK, *September* 17, 1897.

Met pursuant to adjournment.
Present: Counsel as before.
(Adjourned by consent to October 1, 1897, at 2 p. m.)

NEW YORK, *October* 1, 1897.

Met pursuant to adjournment.
Present: Counsel as before.
(Adjourned by consent to Monday, October 4, 1897, at 11 a. m.)

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NEW YORK, *October* 4, 1897.

Met pursuant to adjournment.
Present: Counsel as before.
(Complainant's counsel states that by accident the bottle marked Complainant's Exhibit Siegel-Cooper Bottle No. 2, J. A. S., was broken, and it is agreed by counsel that said bottle and the label and capsule thereon are identical with the bottle exhibit heretofore offered by complainant and marked "Siegel-Cooper Company No. 2, J. A. S., ex'r.")

Cross-examination of KALMAR SAXLEHNER.

By Mr. COE:

Cross-Q. 112. Didn't the firm of Andreas Saxlehner acquire the Hunyady Arpad and Belas spring- by purchase?
A. Yes.
Cross-Q. 113. At what time?
A. I think in 1893 or 1894; I can't say exactly which.
Cross-Q. 114. Was it not on the 6th of July, 1893?
A. Yes; it may be.
Cross-Q. 115. After so purchasing these springs, did you publish the fact that you had so purchased them?
A. Yes.
Cross-Q. 116. What was done with the Hunyady Arpad and Hunyady Belas springs after the firm of Andreas Saxlehner so acquired these springs by purchase on the 6th of July, 1893?
A. They were shut up.
Cross-Q. 117. From what owner did you so purchase these springs?
A. I think from a certain Ungar.
Cross-Q. 118. Was not the full title of this man or firm Ignatz Ungar & Son?
A. Yes, I think so.

Cross-Q. 119. Did not the firm of Andreas Saxlehner acquire
188 at the same time by purchase a spring called the Victoria spring from Ignatz Ungar & Son?
A. I think so; yes.

Cross-Q. 120. What did the firm of Andreas Saxlehner do with that spring?

A. Shut up all the springs.

Cross-Q. 121. What do you mean by the words "shut up" which you have used?

A. They were put out of use.

Cross-Q. 122. By that you mean, I suppose, that the springs were closed up, and the waters thereafter not used by any one.

A. Yes; that is it.

Cross-Q. 123. Were the Hunyady Arpad and the Hunyady Belas springs registered as trade-marks under the then Hungarian trade-mark law at the time of their purchase by the firm of Andreas Saxlehner?

(Objected to as incompetent.)

A. I can't say that; I don't know that exactly, whether they had been registered or not.

Cross-Q. 124. Haven't you any recollection or knowledge on the subject?

(Same objection.)

A. I don't know.

Cross-Q. 125. Did you not testify on direct examination substantially that you had looked up the registration of Hunyadi trade-marks under the Hungarian registry law?

A. Yes, I did; and I know how those several trade-marks are registered, but I don't know whether these are registered. I think they were in 1893, when we bought the springs.

Cross-Q. 126. And, therefore, you say on further recollection, as I understand you, that the Hunyady Belas and Hunyady Arpad were registered under this Hungarian trade-mark law?

(Complainant's counsel objects to the question because the witness has not given any such testimony as stated by counsel's question.)

189 A. I know there were several Hunyadi trade-marks registered, but in 1894 they were wiped from the registry, and I really don't know whether this was among them or not.

Cross-Q. 127. Had you known of the sale of Hunyady Arpad and Hunyady Belas water in the United States prior to your purchase of these springs in the year 1893?

A. I have no personal knowledge of that—no direct knowledge.

Cross-Q. 128. What kind of knowledge did you have?

A. Acquired by hearsay.

Cross-Q. 129. You say "by hearsay." Who informed you of this fact?

(Objected to as incompetent.)

A. I can't remember the persons any more; I couldn't name anybody.

Cross-Q. 130. Did you or did you not know that the Eisner & Mendelson Company were agents for the sale of Hunyady Arpad

and Hunyady Belas in the United States prior to 1893, when you purchased these springs?

A. I know it since I am here.

Cross-Q. 131. Did you not receive information from Ignatz Unger at or before the time you or your firm bought these springs that these waters had been imported for several years into the United States?

A. No; I don't know anything about that.

Cross-Q. 132. You say your active interest or participation in the firm of Andreas Saxlehner commenced in 1888. Will you say that neither you nor any of that firm knew of the sale of these waters in the United States prior to 1893?

A. I don't know about anybody else but myself. I didn't know especially at that time, as in 1888, and after 1888, for several years, I had not been initiated into the more important matters of the business.

Cross-Q. 133. Have you known of the sale in the United
190 States of Hunyady Matyas water, and, if so, how long have you known of it?

A. Since I have been here.

Cross-Q. 134. And only since you have been here?

A. I couldn't say any more; it may be that a year before I came here I heard of it, but I can't tell you exactly when I heard about Hunyady Matyas.

Cross-Q. 135. Did or did not the firm of Andreas Saxlehner know of the sale of these waters?

(Objected to as incompetent.)

A. I don't know; maybe they knew.

Cross-Q. 136. Do you or do you not know that within the last eight years a list of exports of all the mineral waters exported from Budapesth has been published in said city and the exportations to the different countries stated therein?

(Objected to as incompetent.)

A. No; I don't know about that.

Cross-Q. 137. Have you known of the sale of Hunyady Laszlo in the United States?

A. Yes, I know of it because I sent out somebody and somebody bought it here.

Cross-Q. 138. How long have you known of the sale of such water in the United States?

A. I think last year it must have been.

Cross Q. 139. How near to the Hunyadi Janos springs are the Hunyady Arpad and Hunyady Belas springs situated?

A. Maybe two or three miles or four miles. I really don't know; it is very hard to say.

Cross-Q. 140. What sort of miles, English or German miles?

A. I mean English miles.

Cross-Q. 141. How near to the Hunyadi Janos springs are the Hunyady Matyas springs situated?

A. Oh, they are much further.

Cross-Q. 142. How much further?

191 A. I really don't know; it takes about one hour or three-quarters of an hour to walk there going fast.

Cross-Q. 143. Can you tell how far in English miles approximately it is?

A. I don't know; I think an English mile takes twelve or thirteen minutes to walk. I walk a kilometer in about seven or eight minutes.

Cross-Q. 144. Has not the firm of Andreas Saxlehner in past years registered the words Hunyadi Erzebet and Hunyadi Corvin as designations for mineral waters under the Hungarian trade-mark law?

(Objected to as immaterial and irrelevant.)

A. Yes, I think so.

Cross-Q. 145. Have you any knowledge of any litigation in the United States with reference to Hunyady waters in the years 1887 and 1888?

A. I couldn't answer this by personal knowledge; it is simply what I heard when I came to America with the business on my hands.

Cross-Q. 146. Didn't you have some knowledge in the years 1887 and 1888, that the Apollinaris Company, Limited, the then agents of the firm of Andreas Saxlehner in the United States, as you have testified, had litigation against Unger with reference to the Hunyadi Arpad water?

A. No, at that time I didn't hear anything about it.

Cross-Q. 147. When was your first personal knowledge with reference to any such litigation?

A. I just heard it in the United States when I came over here.

Cross-Q. 148. When did you first have knowledge that the Apollinaris Company had brought suit against one Andreas in the years 1887 and 1888 with reference to Hunyady Matyas water?

(Objected to as incompetent, because the witness has already testified that he was not in the United States of America until
192 the year 1895, and any knowledge which he may thereafter have acquired as to the matters happening before that year would necessarily be based upon secondary evidence and be incompetent as such.

Counsel for defendant replies that the very purpose of the question is to inquire as to the witness's knowledge and whether he had any knowledge in the years 1887 and 1888.)

A. At that time I didn't know anything about it.

Cross-Q. 149. Then, as I understand you, you say you had no knowledge in the year 1888 of any important matters relating to the affairs of the firm of Andreas Saxlehner?

A. Well, I have been in the business, but for many years I had to learn it and I did book-keeping work and such things in the

office at home, but I wasn't admitted to confidence about important matters of the business.

Cross-Q. 150. Until when?

A. Maybe five or six years after. Five years perhaps.

Cross-Q. 151. Who has knowledge of the important matters of the firm of Andreas Saxlehner between the year 1888 and the year 1893, during which five years you say you were practically serving an apprenticeship and being initiated into the business?

(Complainant's counsel objects to the question because it does not correctly refer to the testimony of the witness.)

A. My brothers and several of our first officers.

Cross-Q. 152. Who are they?

A. Mr. Andor Saxlehner, Mr. Arpad Saxlehner and Mr. Louis Richter.

Cross-Q. 153. Didn't you have a manager or agent in the United States during the years 1888 to 1895? Before you came to assume charge of the American branch of the business who paid special attention to the United States Hunyadi Janos matters for the firm of Andreas Saxlehner?

A. The Apollinaris Company had the agency till 1895.

Cross-Q. 154. Did not the firm of Andreas Saxlehner have
193 a special man who was accustomed to spend several months a year in the United States looking after the affairs of Andreas Saxlehner in connection with the Apollinaris Company or in communication with the Apollinaris Company?

A. No, we didn't have anybody for that purpose, only I think I know that in 1895 one gentleman was in this country looking around to see how the business matters were, because the Apollinaris Company in 1895 gave notice for the termination of the contract.

Cross-Q. 155. Who was this gentleman you have just referred to in your last answer?

A. Mr. Albin Trojan.

Cross-Q. 157. Is he here now in the United States?

A. Not this moment; but he is generally here with me.

Cross-Q. 158. How often has he been in the United States before?

A. I don't know that.

Cross-Q. 159. Do you know whether or not he has been here before?

A. I know that he traveled here, because he was a traveler for other houses.

Cross-Q. 160. You have said on direct examination that the aggregate annual sale of Hunyadi Janos water is six million bottles. By this you meant the aggregate annual sale throughout the world, did you not?

A. Yes, sir.

Cross-Q. 161. What is the aggregate sale of such water in the United States?

A. I don't like to answer this question for business reasons.

Cross-Q. 162. Was it one-tenth of six million in the United States?

A. If I answer that then you will know the number.

Cross-Q. 163. Then, as I understand you, you decline to answer this question on the ground that it is a private business matter appertaining to the firm of Andreas Saxlehner, which is con-
194 fidential, and which you have no right to state; is that your position?

A. Yes, because we don't like to make public how much we sell in the different countries.

Cross-Q. 164. But you were perfectly willing, for your own purposes, on direct examination, to testify that the aggregate sale was six millions?

A. Yes, sir.

Cross-Q. 165. And now you decline to state what the annual importation into the United States is; is that your position?

A. Yes, sir.

Cross-Q. 166. State whether or not the annual importation of Hunyadi Janos water in the United States in the year 1896 exceeded or was below sixteen thousand cases of 50 bottles each.

A. I decline to answer the question for the reason before stated.

Cross-Q. 167. From how many springs is Hunyadi Janos water drawn?

A. From 112 springs. Excuse me, I want to correct this; we have 112 springs but they are not all in use.

Cross-Q. 168. How many are in use?

A. Well, I really couldn't tell the exact number, but I think 100 and a few.

Cross-Q. 169. Hasn't each of these 112 springs or wells a different name?

A. No, sir.

Cross-Q. 170. Do you mean to say they are all named Hunyadi Janos?

A. Yes.

Cross-Q. 171. Are these 112 springs or wells from which you say you draw the Hunyadi Janos water you sell of the same chemical composition?

A. Yes, sir.

Cross-Q. 172. Is the Hunyadi Janos water which you sell drawn from one spring or from various springs?

195 A. It is taken from various springs, and the water from the different wells is conducted into a cistern from which the bottles are filled.

Cross-Q. 173. For what reason are they so mixed?

A. Because the specific gravity of the springs sometimes differs a little. We always bring in the market water of the same specific gravity.

Cross-Q. 174. Is the chemical analysis of all the springs which you allow to flow into this cistern alike?

A. Yes.

Cross-Q. 175. How is it then that the specific gravity of these springs can differ as you say it does?

A. Well, the specific gravity has nothing to do with the chemical composition.

Cross-Q. 176. Doesn't the difference in the specific gravity show that the springs differ in saline matter?

A Yes. You can change the specific gravity. If you put into a bottle of bitter water a glass of water the specific gravity will be less, but the chemical composition will not be changed a bit.

Cross-Q. 177. Then, if I understand you, you mean to say that the same chemical elements are contained in waters having different specific gravities, but less of such chemical elements in one than in the other?

A. That is only about the specific gravity; but if I speak of chemical composition, then I mean the proportion of each element contained in the water to each other and that is the chemical composition which is constant in our water. The specific gravity we fix by bringing the water of the different wells into the cistern.

Cross-Q. 178. If the specific gravity of one spring is heavier than the specific gravity of the other doesn't it show that there is more of the saline constituents contained in the one that is heavier than in the other that appears of a lighter specific gravity?

196 A. Yes, that is true; but as to the effect or medic-al purpose of the water, it makes no difference except that the water which is filled with more salt might have a more drastic effect, while if the chemical composition is changed the effect of the water is quite different.

Cross-Q. 179. Are not springs located or situated on the hills surrounding Budapesth weaker than those which are located in the valleys?

A. I can't answer that exactly, because I never saw an analysis of a geological work which compared the whole lot of the springs.

Cross-Q. 180. I am only asking you about your springs?

A. Oh, our springs are all on one level; they are all in a valley on one level.

Cross-Q. 181. Do you know where the original- of certain letters from the Apollinaris Company to the firm of Andreas Saxlehner, dated the 24th of January, 1888, and the 26th day of June, 1888, relating to the Hunyadi Janos litigation in the United States, are now?

A. I never saw those original letters.

Cross-Q. 182. Do you know what has become of those original letters?

A. I don't know whether they are in our possession or not; mayby they are amongst some Apollinaris correspondence.

Cross-Q. 183. Will you make search for those letters and produce the same?

(Complainant's counsel advises the witness that he is not required to make search.)

A. I don't know whether I can procure them.

(Counsel for defendant states that the only purpose of this part of

the cross-examination is to notify the firm of Andreas Saxlehner to produce such letters, so that if not produced secondary evidence of their contents may be introduced.)

Cross-Q. 184. Are the waters designated as Hunyady Erzebet and Hunyady Corvin, for which you have stated the firm of An-
197 dreas Saxlehner registered trade-marks under the Hungarian trade-mark law, among the hundred or more springs from which Hunyadi Janos is draw-?

A. No.

Cross-Q. 185. Are you absolutely sure of this?

A. I am absolutely sure of this.

Redirect examination by Mr. KNAUTH:

Redirect Q. 186. When did you first see the bottle like the Hunyady Laszlo before you with the red and blue label and the name of the Eisner & Mendelson Company of New York in red ink thereon?

A. I can't say the exact time; it was last year.

Redirect Q. 187. You mean 1896?

A. Yes.

Redirect Q. 188. Towards the end of the year or in the spring?

A. I can't make a correct statement of that because I don't remember whether it was in the spring or in the fall.

Redirect Q. 189. How did you obtain that bottle?

A. Because somebody first told me that they saw the bottle and I sent to have it purchased.

Redirect Q. 190. Whom did you send out?

A. I sent Mr. Toscani.

Redirect Q. 191. Where did you send him to?

A. I sent him to Charles Crittendon & Company, and if I remember right he bought a dozen.

Redirect Q. 192. Who are Charles Crittendon & Company?

A. Wholesale druggists in New York.

Redirect Q. 193. Do they also deal in mineral waters as jobbers?

A. Yes.

Redirect Q. 194. Did you find this water on their regular price-list or catalogue?

A. I don't know whether I saw that on the price-list or not.

Redirect Q. 195. But at the time when you sent Toscani you found that this water was in stock and sold by them?

198 A. Yes, sir.

Redirect Q. 196. Now please tell us how the bottles of the Hunyadi Janos water are filled in complainant's establishment in Budapesth?

A. The waters from the different wells are conducted through underground pipes to a cistern and from the cistern the water is taken to a filling apparatus where the bottles are filled. Before conducting the water into the cistern from the wells the water of the different wells is measured as to specific gravity every week once or twice and according to these specific gravities the waters are

taken from the wells so that our standard specific gravity is reached in the cistern.

Redirect Q. 197. Then, as I understand you, you have apparatus or mechanism by which you can shut off the flow of water from each spring into the cistern so as to either admit the waters of any given spring or exclude them?

A. Yes, sir.

Redirect Q. 198. Can you state approximately what the capacity of this underground cistern is?

A. 80,000 liters.

Redirect Q. 199. Can you show us by photograph or other pictorial illustration how these various Hunyadi Janos springs are situated and grouped together and their geographical location?

A. I can produce a pamphlet with a photographic illustration of those springs.

(The witness produces a small book in blue binding and indicates the picture on the frontispiece.)

Redirect Q. 200. Is this view of Andreas Saxlehner's establishment, near Budapesth, a correct view of the springs?

A. Yes; it is made after a photograph.

Redirect Q. 201. And that tallies with your personal knowledge of the grounds and so on?

A. Yes.

199 Redirect Q. 202. What you are now referring to is the view contained in Complainant's Exhibit Complainant's Publication No. 2, is it?

A. Yes, sir.

Redirect Q. 203. I now show you a small card containing the printed signature of Eisner & Mendelson, sole lessees, office 6 Barclay street, N. Y., showing a picture of the geographical location of the "better-known Hunyadi springs." Please state whether that picture is a true representation of the surroundings purporting to be shown on the same.

A. No, sir.

Redirect Q. 204. Please state in what way you find the same not to be a true representation?

A. On this picture the Hunyadi Janos and Hunyady Matyas and the Hunyady Arpad are all as if they were in the same valley, while the Hunyadi Janos spring is quite alone in a separate valley where no other springs are, and between the Hunyady Matyas and the Hunyadi Janos there is a range of mountains, and the distance is much larger than shown on this picture, too.

(Complainant's counsel requests that the card be marked for identification "Complainant's Exhibit Advertising Card, J. A. S., ex'r, Oct. 4, 1897.")

Recross by Mr. COE:

Recross-Q. 205. Is not the representation of the Hunyady Matyas spring a fair representation of such spring on the advertising card which you have testified with reference to?

A. As regards the geographical position, I should think not, and as regards the little houses, there are little houses, and the picture may be good, but it is not made after a photograph.

(Examination closed.)

KÁLMÁN SAXLEHNER.

200 SEYMOUR MCCULLAGH, sworn and examined as a witness for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. What is your name, age, residence and occupation?

A. Seymour McCullagh; about 45; residence, Ramapo, New York State; merchant.

Q. 2. Have you ever been acquainted with the Hunyadi Janos bitter water of Andreas Saxlehner?

A. Yes, sir.

Q. 3. Will you please state when and where?

A. In this city, about the year 1877.

Q. 4. Have you ever sold that bitter water in this market?

A. Yes.

Q. 5. Please state in what kind of bottle and under what style of label you sold that bitter water here.

A. It was in an upright bottle similar to Complainant's Exhibit Complainant's Bottle and Label, and it bore a blue label with a red facing, and it had the name of my firm, McCullagh & Company upon it as agents.

Q. 6. I hand you a sheet which has been marked "Exhibit Hunyadi Janos Labels Used in the United States," and ask you to point out on that sheet the label to which you have referred in your last answer.

A. That one (pointing to label).

Q. 7. You mean the second from the top?

A. Yes, I mean the second from the top.

Q. 8. What was the name of your firm at that time?

A. McCullagh & Company.

Q. 9. Please state how long you sold bottles of bitter water bearing the label which has been identified by you on the sheet in this market.

A. About a year.

Q. 10. Did you sell it in any considerable quantity?

201 A. Moderately. I should think somewhere in the neighborhood of about a thousand cases.

Q. 11. Cases containing 50 bottles each?

A. Yes, containing 50 bottles each.

Q. 12. Did you previous to that time know the Hunyadi Janos water in this country under any other label?

A. No.

Q. 13. Had you ever seen it here under any red and white label?

A. Not before that; I saw it after that.

Q. 14. When did you see it under a red and white label?

A. After I became agent for this, some of the water under a red

and white label made its appearance on the market then in a small way.

Q. 15. Now, will you please point out a specimen of that red and white label you have referred to?

A. That one on the top.

Q. 16. You mean the one on the top of the Exhibit Hunyadi Janos Labels Used in the United States?

A. Yes, on the left-hand side.

Q. 17. How was the Hunyadi Janos water which was sold by you called in the trade when it was ordered?

A. Hunyadi water.

Q. 18. Do you mean that when people demanded it they would call for a bottle of Hunyadi water merely?

A. Yes, that is what I mean.

Q. 19. Was there at that time any other bitter water in the market that was bearing the name Hunyadi except the one that you sold?

A. No.

Q. 20. How long did you continue the sale of this water?

A. About a year; a little bit more, perhaps, but not much more.

(Direct examination closed.)

202 Cross-examination by Mr. COE:

Cross-Q. 21. Who succeeded to you as agent for the sale of Hunyadi Janos water?

A. De Bary.

Cross-Q. 22. Were not they the representatives of the Apollinaris Company?

A. Yes, they took the agency of both away from me simultaneously.

Cross-Q. 23. So that virtually the Apollinaris Company were the agents who succeeded you?

A. That is what I mean; yes, sir.

Redirect by Mr. KNAUTH:

Redirect Q. 24. Is it not a fact that you obtained your water also from the Apollinaris Company?

A. Yes.

Redirect Q. 25. Then as I understand the situation, you were a subagent of the Apollinaris Company and you were followed in that agency by De Bary?

A. Yes.

Recross by Mr. COE:

Recross-Q. 26. But the Apollinaris Company had full control of the business, did they not?

A. Oh, yes; they had full control.

(Examination closed.)

(Adjourned to Thursday, October 7, 1897, at 2 p. m.)

(Signature waived.)

203 NEW YORK, *October* 7, 1897.

Met pursuant to adjournment.
Present: Counsel as before.

ALFRED H. KENNEDY, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Give us your name, age, residence and occupation, Mr. Kennedy.
A. Alfred H. Kennedy; age, forty-seven; Newark, New Jersey; proprietary medicines.
Q. 2. In whose employ are you?
A. The Charles H. Crittenton Company.
Q. 3. Are they wholesale dealers in drugs and mineral waters in New York city?
A. Proprietary medicines and mineral waters.
Q. 4. How long have you been in their employ?
A. Thirty-three years.
Q. 5. Has the Charles N. Crittenton Company ever purchased of The Eisner & Mendelson Company, the defendants in these cases, the mineral water called Hunyady Laszlo in bottles like the one that I show you?
A. Yes, sir.
Q. 6. Can you state when last your company purchased such water?
A. July, 1894.
Q. 7. Were the bottles of such Hunyady Laszlo water marked in red print with the name of the Eisner & Mendelson Company in New York as appears in this specimen (showing witness bottle)?
A. To the best of my knowledge, yes.
Q. 8. And you recognize this as one similar to the bottles you obtained?
A. Yes, sir.

204 (Complainant's counsel offered in evidence bottle identified by witness.
Bottle marked "Saxlehner *vs.* Eisner & Mendelson Co., Compl't's Ex. Hunyady Laszlo Bottle, J. A. S.")

Q. 9. Have you still that water in stock for sale?
A. We have a few bottles, but I am not positive.

(Signature waived.)

ROBERT MACLEAN TAFT, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?
A. Occupation of physician and surgeon; 371 West End avenue; twenty-seven—I am nearly twenty-eight.

Q. 2. How long have you been in active practice in this city?
A. Since May, 1894.
Q. 3. And how long were you a student of medicine before that time?
A. Three years.
Q. 4. Do you know the water sold by the complainant, Emilie Saxlehner, under the name of Hunyadi Janos water, of which I now show you a bottle?
A. Yes, sir; I recognize it.
Q. 5. How long have you known this water?
A. I have known the water known as Hunyadi water for, say, ten years; and a year ago, while I was house surgeon in Bellevue hospital, I received a pamphlet explaining that Hunyadi Janos was the original Hunyadi water, and that educated me into the knowledge that this water was the original and only Hunyadi water. Hitherto I had known it simply as Hunyadi water.
Q. 6. Did you previously to that time ever prescribe any Hunyadi water to your patients?
205 A. Yes, sir.
Q. 7. Whenever prescribing or purchasing Hunyadi water, what water did you expect to obtain?
A. I understood there was but one Hunyadi water, and when I told patients to get a bottle of Hunyadi water, I understood they were to get that water.
Q. 8. Is this Hunyadi Janos water a well-known remedy?
A. Yes, sir.
Q. 9. Frequently prescribed by physicians?
A. Yes, sir.
Q. 10. In what style of bottles or under what labels had you known this Hunyadi water?
A. In this peculiar shade of red and blue, I could recognize the labels.
Q. 11. You mean that specimen of labels which is before you?
A. Yes, sir.
Q. 12. Like Compl't's Ex. Complainant's Bottle?
A. Yes.

Cross-examination by Mr. COE:

Cross-Q. 13. How long have you resided in the city of New York?
A. I think I came to New York in 1890.
Cross-Q. 14. How long have you been a practicing physician?
A. Three years and six months; since May, 1894—it is about three years and six months.

Redirect examination by Mr. KNAUTH:

Redirect Q. 15. Where did you reside previous to 1890?
A. In Philadelphia and then Boston.

(Signature waived.)

206 ROBERT M. DALEY, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.
A. My residence, Bellevue hospital; occupation, physician; age, twenty-three.
Q. 2. How long have you been a physician?
A. I have been a physician for two years now.
Q. 3. And how long before that did you study medicine?
A. Three years.
Q. 4. Here in the city of New York or anywhere else?
A. In the city of New York.
Q. 5. Have you in the course of your practice become acquainted or been acquainted with the Hunyadi Janos water of the complainant, Emilie Saxlehner?
A. Yes.
Q. 6. How long have you known that water?
A. Well, I knew it before I practiced medicine and before I studied medicine; probably known it, oh, seven years; anyway seven or eight.
Q. 7. And under what name did you know it?
A. Under the name of Hunyadi water.
Q. 8. Have you prescribed it?
A. Yes.
Q. 9. Whenever prescribing Hunyadi water, what do you expect that your patients would get?
A. I expect they will get Hunyadi Janos.
Q. 10. Have you known the label and bottle in which that water has been sold?
A. Yes.
Q. 11. Please look at the bottle which I now show you, which has been marked "Compl't's Ex. *Exhibit* Complainant's Bottle, and state whether or not that is one of the bottles in which you have known such water to be sold in this market.
207 A. Yes.
Q. 12. Under the red and blue label as appearing on it?
A. Yes.
Q. 13. Is it known as a valuable remedy?
A. Yes.

Cross-examination by Mr. COE:

Cross-Q. 14. Do you know the chemical composition of the Hunyadi Janos water?
A. Well, I know it; I don't know it exactly; I know the principal constituents of it, but not the exact.
Cross-Q. 15. Do you know the chemical composition of any other Hunyadi water?
A. No; I don't know of any other Hunyadi.

Redirect by Mr. KNAUTH:

Recross-Q. 16. In prescribing this Hunyadi water, on what do you act in selecting this as a remedy for your patients?

A. Simply because of what I have heard about it from eminent physicians, that is in my college and also in practice, and also from the way it has acted in my own practice, on account of its being a very valuable aperient water.

(Signature waived.)

JAMES A. GARDNER, called on behalf of plaintiff, being duly sworn, testified as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Twenty-eight years old; Bellevue hospital, residence; physician, occupation.

Q. 2. How long have you been a physician?

A. Three years now; about three years and a half.

Q. 3. Here in the city of New York?

A. Yes.

Q. 4. Where did you make your studies in medicine?

208 A. Physicians and surgeons here in New York.

Q. 5. For how long?

A. Three years.

Q. 6. Had you been a resident of New York city previous to that time?

A. Yes, sir.

Q. 7. How long?

A. About thirteen years.

Q. 8. Are you acquainted with the Hunyadi Janos water of the complainant Emilie Saxlehner?

A. Yes, sir; I have known Hunyadi ever since I was a child, and before I studied medicine; used to use it in my own family.

Q. 9. Used it in your own family?

A. My mother used to use it.

Q. 10. Under what name have you known it?

A. Well, I have always known it as Hunyadi water, and only known the one Hunyadi, expecting that the Hunyadi and Hunyadi Janos were one and the same thing—only the one water.

Q. 11. Have you known in what style of bottles and in what kind of labels this Hunyadi water was sold in this market?

A. I have always recognized it as a bottle of that form of colored paper familiar with the wrapper, I should say, familiar as that put up in that form; always knew it in that form.

Q. 12. You mean like the bottle now before you, Compl't's Ex. Complainant's Bottle?

A. Yes, sir.

Q. 13. In prescribing Hunyadi water to your patients, what do you expect them to get?

A. Hunyadi Janos.

Q. 14. And if they should get any other water in place of Hunyadi Janos——

A. Well, I expect when I prescribe Hunyadi that it will be Hunyadi Janos. I would not think of any other Hunyadi water.
209 If I wrote for Hunyadi I would expect it would be Hunyadi Janos, and if I wrote for some other aperient water under some other name——

Q. 15. Upon what grounds do you prescribe Hunyadi water to your patients?

A. That it has a more pleasant taste than the ordinary salts, which would give an action of good cathartic, and also does not seem to have some of the unpleasant effects that often come from prescribing other cathartics.

Q. 16. Did you know this by personal experience or how otherwise did you come to know this?

A. Well, we get it first through our instructors and professors at college, and then during the three years I have been in Bellevue I found such to be the fact there with my own patients.

Cross-examination by Mr. COE:

Cross-Q. 17. As I understand you to testify, you say you have resided in New York city for the last fifteen years?

A. Yes, sir.

Cross-Q. 18. Haven't you during that time ever heard or seen any other Hunyadi water in the market?

A. No, sir.

(Signature waived.)

FRANK GORDON ESSON, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Age, thirty-two; residence, 122 West Thirty-fourth street, New York; physician.

Q. 2. Are you a practicing physician in New York city?

A. Yes, sir.

Q. 3. How long have you practiced medicine here?

A. Six years in New York.

Q. 4. Where did you make your studies of medicine?
210 A. McGill university, Montreal.

Q. 5. And how long did those studies extend?

A. Four years.

Q. 6. Before that time where did you reside?

A. Resided in Halifax, Nova Scotia, and St. Johns, New Brunswick.

Q. 7. Now, please state whether you know the complainant's Hunyadi Janos water? You know the water?

A. Yes.

Q. 8. How long have you known it?

A. Well, I hardly can remember, it is so long ago; I knew it before I studied medicine as Hunyadi water.

Q. 9. Was it used in your own family?
A. It was.
Q. 10. Before the time that you studied medicine?
A. Before I studied medicine; yes.
Q. 11. Have you known it ever since?
A. I have.
Q. 12. Have you prescribed it to patients?
A. I have.
Q. 13. In what manner do you generally prescribe it to patients?
A. As Hunyadi water.
Q. 14. When prescribing Hunyadi water, you expect your patients to obtain the Hunyadi Janos water?
A. I do.
Q. 15. Have you known the bottles and labels in which that water has been sold to the public?
A. I have.
Q. 16. Can you point out in what style it has been sold?
A. That looks to me like an original bottle.
Q. 17. You mean the bottle before you (indicating Complainant's Exhibit Complainant's Bottle)?
A. Yes.

211 Q. 18. When seeing a bottle of bitter water in a red and blue label substantially like the one before you, would you expect it to be Hunyadi Janos water?

A. I would.
Q. 19. How did you come to prescribe this water to your patients as a remedy?
A. I have used it as an aperient water, the same as I would prescribe salts to another class of patients.
Q. 20. Did you act in this on the general reputation of the water?
A. I did.
Q. 21. Do you regard it as a valuable remedy?
A. I do.

Cross-examination by Mr. COE:

Cross-Q. 22. When did you last prescribe Hunyadi water?
A. I cannot tell; some time within a month.
Cross-Q. 23. To whom?
A. To a patient of mine.
Cross-Q. 24. What store fills your prescriptions generally; what drug store?
A. Weis' drug store, corner of Thirty-fourth and Seventh avenue; sometimes Wilson's.
Cross-Q. 25. Are you absolutely sure it has been your custom to prescribe Hunyadi instead of Hunyadi Janos?
A. It has.

(Signature waived.)

CHARLES A. KINCH, called on behalf of complainant, being duly sworn, testified as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation; the name you have given.

A. You have my name there; I am a physician at 273 West Seventieth street; I am forty-six years of age.

212 Q. 2. Are you a practicing physician in the city of New York?

A. Yes, sir.

Q. 3. How long have you practiced medicine here?

A. I have practiced in New York since 1879—eighteen years.

Q. 4. And before that time did you practice medicine?

A. I practiced six years in New Jersey.

Q. 5. Have you during that time been aequainted with the Hunyadi Janos water of the complainant, of which there is a bottle here before you?

A. Yes, sir.

Q. 6. Please state how long you have known of this water.

A. Oh, I don't remember—more than ten or twelve years.

Q. 7. Have you prescribed it to patients?

A. I have.

Q. 8. You are still prescribing it?

A. Yes, sir.

Q. 9. Under what name or in what manner do you prescribe it usually?

A. I usually say, "Get a bottle of Hunyadi water."

Q. 10. And when ordering a bottle of Hunyadi water you expect your patients to get Hunyadi Janos water?

A. I do.

Q. 11. Have you known the styles of bottles and labels under which it has been in the market here?

A. I have, but not—have not looked at all the marks particularly.

Q. 12. Been familiar with the general color and arrangement of the label?

A. Yes, sir.

Q. 13. When seeing a bottle like Complainant's Exhibit Complainant's Bottle in a drug store or place where bitter waters are sold, would you take it to be a bottle of Hunyadi Janos water?

A. I should want to read the name "Hunyadi" on it to see.

213 Q. 14. Have you found it to be a valuable remedy?

A. Yes, sir.

Q. 15. What is its general reputation as a bitter water and remedy?

A. It has a good reputation.

Q. 16. Do you know whether it is largely used by physicians as an aperient remedy?

A. I am under the impression that it is.

Cross-examination by Mr. COE:

Cross-Q. 17. You say you have been familiar with the Hunyadi Janos for the last ten or twelve years; during that period have you known of any other Hunyadi water in the market?

A. Yes, sir.

Cross-Q. 18. What Hunyadi?

A. Uj Hunyadi.

Cross-Q. 19. That is only recently, is it not?

A. Eighteen months ago was the first I knew of it.

Cross-Q. 20. And prior to that time did you know of any other Hunyadis besides the one you have just designated and the Hunyadi Janos?

A. No.

Cross-Q. 21. Have you, during the last eight months, known of any other?

A. No, sir.

Cross-Q. 22. Then I understand you to say that during the last ten or twelve years you have never seen in any drug store or heard of any other Hunyadi water than the Hunyadi Janos, and during the last eighteen months the Uj Hunyadi; is that correct?

A. I mean I have not noticed; I have not known of any other; yes, sir.

Cross Q. 23. Do you mean you have not noticed or have not known of any other?

A. I mean both.

214 Cross-Q. 24. During the last ten or twelve years, haven't you seen pamphlets or publications advertising in any way other Hunyadi waters under the names of Hunyady Matyas or Hunyady Arpad or Hunyady Belas?

A. I remember the name Arpad in some connection.

Cross-Q. 25. And in connection with the word "Hunyadi"?

A. Hungarian bitter water—yes, I suppose so; I am not sure about that.

Cross-Q. 26. Haven't you also heard or known of Hunyady Matyas—M-a-t-y-a-s, I will spell it for you?

A. Yes, I have seen that name somewheres.

Cross-Q. 27. Don't you recollect during the last ten years having received circulars or pamphlets or literature of some sort where the label shown on the bottle now shown you, marked Complainant's Exhibit Weeks & Potter No. 1, which is a bottle of Hunyadi Matyas water, was printed?

A. I don't recollect; I have not paid any attention to that.

Cross-Q. 28. Haven't you seen in the market during the last ten years bottles of Hunyadi or Hungarian bitter water like the bottles now shown you?

A. I don't know; I don't recognize that at all.

Cross-Q. 29. You are testifying now that you don't recollect it; are you sure you have not seen bottles like that in drug stores during the last ten or twelve years?

A. The question is, am I sure I have not seen those bottles?

Cross-Q. 30. Yes, in drug stores in the city of New York?

A. Yes, I am sure I have not seen those bottles to know them.

Cross-Q. 31. What drug store generally fills your prescriptions?

A. I do not send my prescriptions to one drug store.

Cross Q. 32. Please give a list of the drug stores you generally send your prescriptions to as far as you recollect.

A. Well, now, some of my prescriptions go to Perry's—is that what you want?

215 Cross-Q. 33. That is what I want; give the names and addresses.

A. Some of them go to Kerley, Seventieth street and Boulevard; some go to Montresser, Seventieth street and West End avenue; some go to Brannigan's, Sixty-seventh street; I guess they don't get bitter water there.

Cross-Q. 34. Where all your prescriptions go, as long as they are drug stores, that don't make any difference?

A. Sixty-seventh street and Amsterdam avenue; some go to Erb's, Sixty-fifth street and Amsterdam avenue; some go to Cassibeer's, Seventy-second street and Columbus avenue; some go to Wallington & Carpenter, Seventy-sixth street and Boulevard. Then others scattered all over the city.

Redirect examination by Mr. KNAUTH:

Redirect Q. 35. When such waters as have been named by defendant's counsel like Hunyadi Arpad or Hunyady Bela ever came to your notice, did you know whether those waters were also sold by Andreas Saxlehner, or the complainant Emilie Saxlehner, or anybody else?

A. I did not know about that.

Redirect Q. 36. Or did you know where they came from, whether from the same establishment or from any other establishment?

A. No; I did not.

Redirect Q. 37. As I understand, you have prescribed Hunyadi water to your patients on account of the reputation which the Hunyadi Janos water has had in the market for a number of years?

A. Yes, sir.

Redirect Q. 38. And whenever you do prescribe Hunyadi water, you expect your patients to receive Hunyadi Janos water?

A. Yes.

Redirect Q. 39. I will ask you another question, Doctor.

216 Was there more than one instance in which one of your patients obtained a bottle of Uj Hunyadi water instead of the Hunyadi Janos water on your prescription, or was it only one instance?

A. That one instance was impressed upon me, because I was surprised to find that there was another bitter water put up with a label so much like it.

Recross by Mr. COE:

Recross-Q. 40. By Uj Hunyadi water, you mean the water which is also called by the alternative name of Apenta water, do you not?

A. Yes, sir.

Recross-Q. 41. You consider that the label on the Apenta water bottle is very much like the Hunyadi Janos label; do I so understand you?

A. I cannot recall how the label looks.

(Signature waived.)

WILLIAM A. EWING, called on behalf of complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. My name is William A. Ewing; I am fifty-five years of age; my residence is No. 134 West Fifty-eighth street; I am a physician and surgeon.

Q. 2. Are you a practicing physician in New York city?

A. I am.

Q. 3. How long have you been practicing medicine here?

A. Twenty-seven years.

Q. 4. Are you acquainted with the Hunyadi Janos water sold by the complainant Emilie Saxlehner?

217 A. I am acquainted with the Hunyadi Janos water; I don't know by whom it is sold.

Q. 5. Are you acquainted with the form of bottle and style of label in which it has been sold in this market?

A. With the general appearance of it?

Q. 6. The colors?

A. Yes, sir.

Q. 7. And arrangement?

A. Yes, sir.

Q. 8. Do you recognize this bottle (handing witness Compl't's Ex. Complainant's Bottle)?

A. I don't think if I was handed the bottle I could say whether it was genuine or not, but it has the general appearance of the Hunyadi Janos water.

Q. 9. Under what name have you known this water to be sold in the market?

A. Under the name of Hunyadi—Hunyadi water.

Q. 10. Have you prescribed it under that name to your patients?

A. Often—frequently.

Q. 11. Can you state how long you have known this water here?

A. Well, it seems to me as if the water has been on the market since I have been in practice—it seems to me—I don't remember the time when I have not been familiar with the water.

Q. 12. Has the water any reputation as a bitter water?

A. It has.

Q. 13. Good reputation?

A. Good reputation as a bitter or laxative water.

Q. 14. Is it largely used and prescribed by physicians?

A. Very largely used and prescribed.

Q. 15. Have you always known it under the name of Hunyadi water here?

A. I have always known it under the name of Hunyadi water. Of course, if one is to be explicit they would know it under
218 the name of Hunyadi Janos, but the term "Hunyadi" has always, to my mind, been sufficiently explicit to enable the person to get what water I wished, which is the Hunyadi Janos water.

Q. 16. So that when you prescribe a bottle of Hunyadi water to a patient, you would expect he would be furnished with Hunyadi Janos water?

A. Yes, sir.

Cross-examination by Mr. COE:

Cross-Q. 17. During the last ten years haven't you known of any other Hunyadi waters in the market?

A. No, sir; it has not been called to my attention at all.

Cross-Q. 18. You say you have prescribed Hunyadi Janos water to patients; how did you so prescribe it—in writing or by telling them?

A. Usually by telling them; I very rarely prescribe the water—make a written prescription for it—but merely tell them to get a bottle of Hunyadi water, and under those circumstances I would expect them to bring a bottle of Hunyadi Janos water.

Cross-Q. 19. Do I understand you to say that during the last ten or twelve years you have never seen or heard of any Hunyadi water except the Hunyadi Janos water?

A. I never have; no, sir. My attention has never been called to any other water than the Hunyadi water.

Cross-Q. 20. What drug stores do you generally give your prescriptions to?

A. My prescriptions go to Mr. Kellogg, corner of Fifth-eighth street and Sixth avenue, very largely; Smith & Stage, Fifty-seventh street and Seventh avenue, and John Ihlfeld, 950 Eighth avenue. To those three places probably the bulk of my prescriptions go.

Cross-Q. 21. So if you told a patient to get a bottle of Hunyadi water, as you say you were in the habit of doing, your patient most likely would go to one of those three places?

A. Of course, my practice is scattered all over the city, and
219 they would probably go to the nearest one. I never advise people to go anywhere particularly, unless they ask me.

Cross-Q. 22. But a good many of your patients would probably deal in the three drug stores you have designated, would they not?

A. If they lived in that neighborhood.

Cross-Q. 23. During the last ten or twelve years haven't you ever received a circular or a pamphlet or literature of that character advertising any other Hunyadi water other than the Hunyadi Janos?

A. Not to my knowledge.

Cross-Q. 24. Haven't you ever seen the advertisements of other Hunyadi waters in medical papers during the last ten or twelve years?

A. I have never noticed any other.

Redirect examination by Mr. KNAUTH:

Redirect Q. 25. You have carried on a large and lucrative practice in New York city for the last twenty years?

A. Yes, sir; more than that.

(Signature waived.)

RICHARD EWELL BROWN, called on behalf of the complainant, being duly sworn, testified as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Twenty-seven years old; physician; 60 West Fifty-eighth street.

Q. 2. How long have you been practicing medicine in New York city?

A. Since 1894, May.

Q. 3. Prior to that time what did you do?

220 A. I was a medical student—student of medicine and at college.

Q. 4. For how many years?

A. I was a student for four years.

Q. 5. Here in the city of New York?

A. Three years in the city of New York.

Q. 6. And one year elsewhere?

A. One year elsewhere; one year in Tennessee.

Q. 7. Where did you live before that time?

A. I lived in Tennessee; Spring Hill, Tennessee.

Q. 8. Do you know the complainant's water, Hunyadi Janos water?

A. I do; yes.

Q. 9. How long have you know- of that water?

A. Well, I cannot say positively; but I should say about ten or fifteen years I have known of it; I cannot say positively; ten years, and probably about fifteen or twenty, as I remember it as a child.

Q. 10. Was it used in your family then?

A. Yes.

Q. 11. Are you prescribing it to patients?

A. Yes.

Q. 12. Under what name did you know it during all those years?

A. Well, I have usually known it under the name of Hunyadi—

simply as Hunyadi water; it is usually spoken of as that, and more particularly as Hunyadi Janos.

Q. 13. How do you usually prescribe it to patients?

A. As Hunyadi, simply.

Q. 14. You say a bottle of Hunyadi water?

A. I advise a patient simply to get a bottle of Hunyadi water.

Q. 15. And when making such prescription you expect such patient to be furnished with a bottle of Hunyadi Janos water?

A. Yes.

221 Q. 16. Have you known the bottles and general styles of labels under which the water has been sold here?

A. Yes; fairly well.

Q. 17. Do you recognize the style of bottles?

A. I should say yes; the bottle with the yellow label I think I have seen (referring to Complainant's Exhibit Complainant's Former Bottle).

Q. 18. Do you mean the small red diamond on a yellow label, which is pasted on that bottle?

A. Yes; which is pasted on the bottle—yes.

Q. 19. Has that been the style of bottle under which you have known this water in the market here for years?

A. Yes; that is the style as I remember it.

Q. 20. Do you also know the style of bottle shown by Complainant's Exhibit Complainant's Bottle, which I now show you?

A. I know the general style of label, yes; I have known it as that.

Q. 21. You would recognize it under this blue and red label?

A. Yes.

Q. 22. Have you known this water as a valuable remedy in medicine?

A. Yes.

Q. 23. Prescribed it frequently?

A. I have prescribed it quite frequently; yes.

Cross-examined by Mr. COE:

Cross-Q. 24. As I understand you, you have resided in the city of New York for six years?

A. Since 1891 I have resided in the city of New York.

Cross-Q. 25. Since 1891 and until 1894 you were a medical student, and since 1894 you have been in active practice?

A. Yes; since 1894. I was two years in Bellevue hospital, and since May 1, 1896, I have been in active practice—general practice.

222 Cross-Q. 26. During the time of your residence in New York during the last seven years, have you known of any other Hunyadi water than Hunyadi Janos water?

A. Yes; Hunyadi Lajos, I think is the style. I have not known anything of it, except that I have seen the name.

Cross-Q. 27. No other Hunyadi water besides that?

A. No; I had no knowledge of any other; I knew that there were other Hunyadi waters, but I knew nothing of them.

Redirect by Mr. KNAUTH:

Redirect Q. 28. Did you know whether those other Hunyadi waters were also sold by Andreas Saxlehner or the complainant Emilie Saxlehner, or by anybody else?

A. No, I did not.

Redirect Q. 29. When first did you know anything about the Hun-ady Lajos water of which you have spoken?

A. I think the first knowledge I had of it was through a circular which I received warning against imitations of Hunyadi Janos.

Redirect Q. 30. And that was when?

A. I could not say; I think that was about two or three years ago; I think it was while I was in the hospital, during my last year in the hospital—two years ago.

Redirect Q. 31. So you did not know in what way or in what bottle or under what label that Hunyady Lajos water was sold in the market?

A. No.

Redirect Q. 32. You know that only from a cautionary circular of the complainant?

A. Yes.

Redirect Q. 33. You have never prescribed any water but the Hunyadi Janos water?

A. No.

Redirect Q. 34. As a Hunyadi water?

A. No.

(Signature waived.)

223 JAMES HARVIE DEW, called on behalf of the complainant, being duly sworn, testified as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. I have given the name, James Harvie Dew, my full name; my residence is 252 West Fifty-fourth street; I am 54 years old; physician by profession.

Q. 2. How long have you been practicing as a physician in the city of New York?

A. In private practice 27 years; two years in the hospitals here before going into practice.

Q. 3. Did you during that time become or be acquainted with the Hunyadi Janos water of the complainant?

A. Yes, thoroughly, I had supposed.

Q. 4. Have you used it or prescribed it?

A. Prescribed it frequently.

Q. 5. To your patients?

A. I have several patients taking it now.

Q. 6. When you prescribe it to patients how do you usually prescribe it?

A. My usual way of prescribing is simply tell the patient to go and get a bottle of Hunyadi water.

Q. 7. And in telling that to your patients you expect they will obtain a bottle of Hunyadi Janos water?

A. Hunyadi Janos water—that is exactly what I always expected, and really was not aware that somebody was trying to imitate it.

Q. 8. Have you been acquainted with the style of label or bottle in which the Hunyadi Janos has been sold in the market?

A. Yes, I have been acquainted with this label.

Q. 9. You mean the label before you—the red and blue label on the specimen Complainant's Exhibit Complainant's Bottle?

A. Yes; it is possible that there is an imitation; my patients may have secured the imitation at some time without my
224 seeing the bottle, but whenever I have ordered it that has been my intention to get the bottle here.

Q. 10. To get the pure Hunyadi water?

A. The special brand.

Q. 11. What is the reputation of the Hunyadi water as a bitter water?

A. It enjoys a very excellent reputation both among the medical profession and laity, and I have great confidence in it.

Q. 12. Is it largely used in this country?

A. I take it to be quite largely. Of course, we are not apt to know what other doctors are doing, but we are apt to form conclusions from those we come in contact with. In coming in contact with people I find it is very largely used; I frequently find my patients taking it without my prescribing it, and I tell them to go ahead, that is satisfactory.

Q. 13. What I want to know is the reputation it has among the bitter waters used by physicians?

A. I really believe its position probably stands first; I think I find it more popular than any other one I could name of those bitter waters. I am not saying that because of this little incident, but because it is a fact; in my experience that is the case; I more frequently find my patients taking this water than most any other of the bitter waters that I know of. I sometimes order other waters myself, particularly if patients tell me Hunyadi water is not pleasant to them, as we find them complain often of seidlitz powders—either because it physics too much, or for some other reasons; I have sometimes ordered other waters quite often, but probably this more frequently than any other one of the bitter waters.

Cross examined by Mr. COE:

Cross-Q. 14. What other waters do you prescribe?

A. The Franz Josef water I order from time to time; I order Saratoga—the different waters of Saratoga; sometimes order the Villacabras water.

225 Cross-Q. 15. Was not the Franz Josef water sold here as Hunyadi water?

A. Very much in the same way; it was kept in the drug stores in bottles; I frequently direct them to get a bottle of Franz Joseph

water, purgative water; and the Freiderichshall water I use a good deal, too; have ordered it often.

Cross Q. 16. During the last ten or twelve years haven't you known of any other Hunyadi water in the market than Hunyadi Janos water?

A. I never supposed there was any other.

Cross-Q. 17. And the Franz Josef?

A. Why would you put it "and the Franz Josef"? I don't exactly understand that question. Franz Josef water is one of those purgative waters, belongs to this same bitter class of water, probably not so bitter as Hunyadi water; does not contain quite so much of the sulphate of magnesia as the Hunyadi water, and consequently is not quite so bitter. In some cases I have ordered it in that way for that reason, but that it is not exactly classified as a Hungarian water; I have not looked at it exactly that way. I think that is a Spanish water, isn't it?

By Mr. KNAUTH:

Redirect Q. 18. It is a different water, that is all?

A. Different water—different name and claimed differently; and patients do not require them quite so bitter as some of those other waters; it is for that reason that I have so ordered it. Carlsbad water I very frequently order; so that I am familiar with most of those purgative waters, and order them quite frequently.

By Mr. COE:

Cross-Q. 19. Does not the Franz Jos-f water contain more of the sulphate of magnesia than the Hunyadi Janos water?

A. Now, as to the exact ingredients of those waters, I think
226 you can puzzle me on that; we do not keep those tables straight in our minds; I have only looked at Franz Josef as not so bitter as this water.

Cross-Q. 20. So bitter as this water—you mean Hunyadi Janos?

A. Yes; and for that reason when I have ordered Franz Josef it was for that reason. My supposition was it was the presence of the sulphate of magnesia that gives to this the bitterish principle it contains, and its efficacy, and I have supposed it contained less.

Cross-Q. 21. Hasn't the Franz Josef water been sold in the United States as Hunyadi Josef water?

A. Not that I am aware of.

Cross-Q. 22. Haven't you ever heard, during the last ten years, of the Hungarian bitter water called Hunyady Matyas water?

A. I think not, sir; I think I have never heard of it.

Cross-Q. 23. Never seen it?

A. Not that I am aware of.

Cross-Q. 24. And haven't you known of Hungarian bitter water called Hunyady Arpad in the United States, during the last ten or twelve years?

A. I have not; no, sir.

Cross-Q. 25. Nor Hunyadi Bela?

A. No, sir.

Cross-Q. 26. Haven't you received any circulars or pamphlets or literature of any sort advertising any of those three waters, during the last ten or twelve years?

A. It is possible I have, but I am not aware of having read them or do not remember them.

Cross-Q. 27. Haven't you seen an advertisement of Hunyady Matyas water, or other Hunyadi water, in medical papers or journals, during the last ten or twelve years?

A. My attention has not been called to them; don't know that *that* I have. I was not aware of the fact that there was any
227 other Hunyadi water on the market but this, to tell you the truth. I was not aware of it, otherwise I might have been more careful in some of my prescriptions, maybe.

Redirect by Mr. KNAUTH:

Redirect Q. 28. From your knowledge of Hunyadi Janos water as it has been sold in the market, what would you say to a bottle of Hunyady Matyas water as appearing before you, if you were told that it came from another spring and was sold by another person than Saxlehner?

A. Well, I cannot say what I would say if I read the literature on the subject and saw its contents and so forth—I could not say what I would say about it. I might recognize the water as having the ingredients necessary to be a good or valuable water; I would not be able to say about that. The only testimony I can give directly is that I have not had my attention attracted to any of these waters, and that the Hunyadi Janos water is the only water I recognize that I have knowledge of. If my patients have purchased waters of that sort from time to time and used them and simply told me they were taking Hunyadi water, I might have told them to go ahead under the supposition that it was the water I was familiar with. With the action of this water I am familiar; with the other preparations I am not familiar, and that is all I can say.

Redirect Q. 29. Would it be fair in your opinion for the owner of another spring, even in Hungaria, to dress up his waters in a bottle and with a label like the one before you in which this Hunyady Matyas water appears, comparing the colors of the label, the style and general arrangement?

(Mr. COE: Objected to as incompetent, immaterial and irrelevant.)

A. Well, I should think it would be with a view of getting a part of the trade or part of the reputation of the other bottle. I should think that would be unfair in a certain sense of the word;
228 whatever the legal rights are in the matter I could not express myself, but I should think that it contains a label as close like the other as possible; it was an effort to imitate to a certain degree another bottle which has preceded it.

Recross-examination by Mr. COE:

Recross-Q. 30. Look at the chemical analysis on this Hunyady Matyas bottle and state whether if the contents of this bottle corresponds to such chemical analysis, whether in your opinion it would not be a good Hungarian bitter water?

(Mr. KNAUTH: Objected to as immaterial and irrelevant.)

A. I certainly could not say it would not. The ingredients there are plausible. I mean by that its ingredients would not appear to me as anything wrong by a glance at it. I would only say that so far as my prescribing is concerned, if my patients asked me any questions I should tell them my experience was in the use of Hunyadi Janos water, and I wanted them to get that because I know what that would do, and I do not know about this because I have never had any experience with it.

Cross-Q. 31. If the contents of the Hunyady Matyas bottle which has been referred to both in redirect examination and now in recross-examination, corresponded to the chemical analysis shown on such bottle, whould not the effect in your opinion be good?

(Mr. KNAUTH: Same objection.)

A. I have just now said, so far as I could say, I should think that would make a good bitter water, and I do not see why the effects would not be good as far as I know; I do not say it would not be good. We doctors are guided by our experience in the use of any given thing as to its efficacy in given cases, and our personal experience in the use of it.

Recross Q. 32. You don't know where the Hunyady Matyas spring is situated, then?

A. I don't know the exact location of it. The Matyas, you mean? No, sir, I do not. This has never been brought to my notice that I am aware of at all, this particular water.

229 Recross-Q. 33. Are you absolutely sure you have not seen advertisements of this Hunyady Matyas water in medical papers, journals, circulars, or literature of any sort, during the last ten or twelve years?

A. I cannot swear I have not, but I can swear it has never made any impression on me if I did see it. I am not familiar with this water. I am familiar with the other water. I used the other water constantly in my practice. I don't know this water.

Recross-Q. 34. Do you know the Eisner & Mendelson Company as the sellers of Carlsbad water and Carlsbad salts?

A. No, sir; I can't say as I do. I know them better as sellers of Hoff's malt, Johann Hoff's malt. I frequently order that preparation of theirs and use that name very often; tell them to be sure and get Mendelson's preparation.

Recross-Q. 35. You see this bottle of Hunyady Matyas water, "Eisner & Mendelson, New York, sole lessees"?

A. Yes.

Recross-Q. 36. Would not that be a guarantee to you that they were selling a genuine water?

(Mr. KNAUTH: Objected to as incompetent, irrelevant and immaterial.)

A. Well, I could not say anything about that part of it; I could hardly express myself on that. There has been a very considerable question in our minds to whether their malt extract was obtained abroad, but we have been convinced that their Hoff's malt extract was a very excellent preparation, whether it was made in Philadelphia or whether they got it from the other side. These people down here, Tarrant, we had a great deal of their literature and a great deal of discussion.

Recross-Q. 37. Whether the firm name of Eisner & Mendelson Company would be any sort of guarantee to you that they would not put an imitation on the market?

A. I think that is one of those things a doctor could not answer. We have a great many waters made with certain salts
230 added to certain water and sold; which ones those are I do not know personally, but I have no reason to think to the contrary. I have no reason to doubt the validity of that company and the truthfulness of the representations they make. As far — I know, they are reliable people; I can say nothing to the contrary.

(Signature waived.)

(Adjourned to October 8, 1897, at 2 o'clock p. m.)

NEW YORK, *October* 8, 1897.

Met pursuant to adjournment.

Present: Counsel as before.

HENRY F. OWSLEY, sworn and examined for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. Henry F. Owsley; 27 years old; Bellevue hospital; physician.

Q. 2. Are you a practicing physician in the city of New York.

A. I have been a practicing physician; I am now in the hospital.

Q. 3. How long have you been practicing medicine here?

A. Two years.

Q. 4. And during what years?

A. 1896 and 1897.

Q. 5. In 1897 to which hospital did you go?

A. Bellevue hospital.

Q. 6. And you occupy the position of physician at Bellevue hospital now?

A. Surgeon at Bellevue hospital.

Q. 7. Where did you study medicine?

231 A. The College of Physicians and Surgeons.

Q. 8. In the city of New York?

A. New York city.

Q. 9. And how long did your studies extend?
A. Three years.
Q. 10. Have you known the complainant's water called Hunyadi Janos water being a bitter water?
A. Yes, sir.
Q. 12. How long have you known it?
A. Twelve or fifteen years; about fifteen years.
Q. 13. Have you used it yourself?
A. I have.
Q. 14. Have you prescribed it as a physician to patients?
A. Yes, sir.
Q. 15. What position does it occupy as a bitter water among the bitter waters which are known and used?
A. I don't quite understand that. Do you mean its action or its use?
Q. 16. I mean, so far as its extent of sale is concerned, its excellence.
A. It occupies the foremost position.
Q. 17. Under what name have you known this water?
A. Hunyadi.
Q. 18. As Hunyadi water?
A. As Hunyadi water.
Q. 19. How do you usually prescribe it to patients?
A. A wineglassful in the morning before breakfast.
Q. 20. I mean under what name do you prescribe it to patients.
A. Hunyadi water.
Q. 21. When you send a patient to the drug store you give him a slip of paper or tell him to get a bottle of Hunyadi water?
A. Yes.
Q. 22. And then you expect to get Hunyadi Janos in answer to that?
232 A. I do.
Q. 23. Has that always been the case in your experience?
A. It has not.
Q. 24. What do you mean by it has not?
A. I mean that other bitter waters or other waters that are called Hunyadi water are substituted for it.
Q. 25. Has this occurred in your own experience?
A. It has.
Q. 26. Can you tell us when or on what occasions?
A. In the last summer I knew of two or three instances, but not since I have been in the hospital, however, because there I do no outside practice whatsoever.
Q. 27. Did those instances which you have stated all occur last summer?
A. Yes, sir.
Q. 28. Can you tell us what was furnished to your patients in place of the Hunyadi Janos water?
A. Yes; Lajos water, I think it is called.
Q. 29. Do you mean Hunyadi Lajos water?
A. Yes.

Q. 30. Can you remember another instance in which either the same or some other water was substituted?

A. I don't remember another water, but I know that occurred two or three times.

Q. 31. And that was against your expectations?

A. It was.

Cross-examined by Mr. COE:

Cross-Q. 32. Do you know of a Hunyadi water in the market called Hunyadi Matyas?

A. No, sir.

Redirect by Mr. KNAUTH:

Redirect Q. 33. Do you know whether this Hunyady Lajos water was furnished to your patients at a lower price than the Hunyadi Janos water?

A. I suspect it was, but I am not positive about that.

(Examination closed.)
(Signature waived.)

233 FRANK HOLLISTER, sworn and examined for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Frank Hollister; age, 31; 264 West Seventy-seventh street; physician.

Q. 2. Are you practicing medicine in the city of New York?

A. Yes, sir.

Q. 3. How long have you been practicing as a physician in New York?

A. Since 1890.

Q. 4. And previous to that time where did you conduct your studies?

A. Bellevue hospital and medical college.

Q. 5. Both in the city of New York?

A. Yes, sir.

Q. 6. How long did those studies continue?

A. Three years at the medical college.

Q. 7. Have you known the complainant's water called Hunyadi Janos water being a bitter water?

A. Yes, sir.

Q. 8. How long have you known that water?

A. Oh, I should say ten or fifteen years.

Q. 9. Have you used it yourself?

A. Yes, sir.

Q. 10. Have you prescribed it to patients?

A. Yes, sir.

Q. 11. Are you acquainted with the bottle and label or general style in which the water is sold?

A. Yes, sir.

Q. 12. Can you point out to us a bottle of it here on the table?

A. If you have got one here.

Q. 13. (Showing witness bottle.) Is that one of them?

234 A. That looks like it; yes (indicating Complainant's Exhibit Bottle).

Q. 14. How long have you known that water in substantially such bottle and with such label?

A. To my recollection it has always been the same.

Q. 15. How is that water called by the public and among physicians?

A. It is referred to as Hunyadi.

Q. 16. You mean it is called Hunyadi water?

A. Hunyadi water; yes, sir.

Q. 17. Have you prescribed it to your patients under the name Hunyadi water?

A. Yes, sir.

Q. 18. And that has been the case all through the time that you knew this water here?

A. Yes, sir.

Q. 19. So that whenever you prescribe a bottle of Hunyadi water to a patient, you expect that Hunyadi Janos water will be furnished to him?

A. I take that for granted.

Q. 20. Now has that always been done so far as you know? I mean have your patients always been furnished with the water?

A. I suppose so.

Q. 21. You never had any reason to believe the contrary?

A. No, sir.

Q. 22. Have you frequently seen bottles of Hunyadi Janos water in the possession of your patients when calling upon them?

A. Yes, sir.

Q. 23. Water which you had prescribed for them?

A. Yes, sir.

Q. 24. What is the reputation of the Hunyadi Janos water among bitter waters?

A. An excellent laxative bitter water.

235 Q. 25. Is it sold and used largely?

A. Yes, sir.

Q. 26. Even at the present time?

A. Yes, sir.

Q. 27. Are you acquainted with any other bitter waters?

A. No other Hunyadi bitter waters.

Q. 28. But you know some other bitter waters, do you?

A. I do; yes, sir.

Q. 29. Spanish or American bitter waters?

A. Both.

Q. 30. Do you know among bitter waters any bitter water which

is sold in a bottle and a label substantially like that used for the Hunyadi Janos water?

A. No, sir.

Q. 31. You know the bottles that are used for the Saratoga mineral waters?

A. Yes, but they are not like that.

Q. 32. And you know those which are used for Spanish bitter waters?

A. Yes, sir.

Q. 33. They are also quite different, are they?

A. Very different.

Q. 34. Are not all the bottles which are used for the other bitter waters which are well known in the market different from this?

A. I can't say.

Q. 35. You don't know?

A. No, sir.

Q. 36. And so far as you know not one of the other bitter waters has a similar label or style of bottle to this?

A. Not that I am familiar with.

Cross-examined by Mr. COE:

Cross-Q. 37. You say you have been practicing in the city of New York the last seven years?

236 A. Yes, sir.

Cross-Q. 38. During that period have you known of a Hungarian bitter water called Hunyady Matyas?

A. No, sir.

Cross-Q. 39. You say that you know that the Hunyadi Janos has a large sale?

A. Yes, sir.

Cross-Q. 40. And you know nothing about the Hunyady Matyas water as I understand you?

A. No.

Cross-Q. 41. And you don't know that that water has been on the market for seven years and been sold to the extent of two million bottles in the United States during that time?

A. No, sir.

Cross-Q 42. You say you prescribe Hunyadi Janos as Hunyadi water. How do you do it?

A. Usually a verbal prescription, saying, "Take so much Hunyadi;" sometimes, "Get a bottle of Hunyadi and take it so often."

Cross-Q. 43. What drug stores do your prescriptions go to?

A. I am not partial to any one drug store, sir. My location is on the Upper West side and I presume they go to the drug stores in that vicinity.

Cross-Q. 44. Please state what drug stores are in that vicinity and to which drug stores prescriptions of yours are likely to go?

A. Well, there is Cassabeer, Seventy-second street and Columbus avenue. Do you want any others, sir?

Cross-Q. 45. Well, give a list as near as you can give it without

taxing your memory too much of the drug stores that your prescriptions would be likely to go to?

A. Carpenter, Walling & Company, Seventy-sixth street and Boulevard; Caswell & Massey, Seventy-seventh street and Columbus; Ammon, Eighty-first street and Columbus avenue; Spankenberg & Boyd, Eighty-second street and Columbus; there may be several others that I don't recall.

237 Cross-Q. 46. What is the principal characteristics of the Hunyadi Janos bitter water? What constitutes the Hunyadi Janos bitter water?

A. I am not prepared to testify from analysis, sir.

Cross-Q. 47. Haven't you any idea of the chemical constituents of the Hunyadi Janos water?

A. Yes, sir.

Cross-Q. 48. Please state what you consider is the prominent characteristic or prominent chemical constituent of the Hunyadi Janos water?

A. Sulphate of soda.

Cross-Q. 49. Any others that you can recollect?

A. There are quite a number of constituents. I don't recall them and the quantity or quality.

Cross-Q. 50. This chemical constituent sulphate of soda constitutes a bitter water, or what you would designate as bitter water?

A. A solution of it will make a bitter water.

Cross-Q. 51. Are you not mistaken in your statement that sulphate of soda is a prominent chemical constituent or characteristic of the Hunyadi Janos water; isn't sulphate of magnesia such prominent chemical element or constituent?

A. I said that there were other constituents.

Cross-Q. 52. I understand that, but as I also understood you to state that sulphate of soda constituted in your opinion the prominent chemical element or characteristic of a bitter water?

A. You asked me to name one of them, sir.

Cross-Q. 53. Just wait until I get through. I ask you whether you were not mistaken in the statement that sulphate of soda was the most prominent chemical constituent or element of the bitter water. Is not sulphate of magnesia such principal element or constituent?

A. It might be of a bitter water.

238 Cross-Q. 54. Isn't sulphate of magnesia the most prominent characteristic constituent or chemical element of the Hunyadi Janos bitter water?

A. I am not prepared to say; it is a multiple composition.

Cross-Q. 55. Is that the best answer you can make to that question?

A. Yes, sir.

Cross-Q. 56. Isn't the sulphate of magnesia of commerce ordinarily called epsom or bitter salt?

A. Yes, sir.

Cross-Q. 57. Would not then the water containing as its most

prominent chemical constituent sulphate of magnesia be called a bitter water?

A. I suppose it would be bitter.

Cross-Q. 58. I have understood that you characterize in your direct examination Saratoga waters as bitter waters. What are the chemical constituents of the Saratoga waters you so designated, or meant to designate, as bitter waters?

A. I am not prepared to give an analysis of Saratoga water, sir.

Cross-Q. 59. Are such Saratoga waters generally accepted and known as bitter waters?

A. Not to my knowledge.

Redirect by Mr. KNAUTH:

Redirect Q. 60. Doctor, when you prescribe Hunyadi water to a patient, do you first examine the analysis of the Hunyadi Janos water, or did you act upon the general reputation and excellence of the water?

A. I act upon the general reputation of the water.

Redirect Q. 61. Was that water recommended to you generally when you were a student of medecine as a valuable remedy?

A. It was first recommended as a boy as a household article and used as a laxative.

239 Redirect Q. 61. You haven't quite answered my question that I put, whether it was recommended when you studied medecine among valuable remedies or bitter waters?

A. I am not prepared to say.

Redirect Q. 62. Then whenever you prescribed Hunyadi water to a patient you prescribed it simply because it was then known to you as a valuable remedy with laxative qualities which had been approved in the course of years?

A. Yes, sir.

Redirect Q. 63. You didn't care and didn't inquire whether there was a surplusage of sulphate of magnesia or sulphate of soda in it or either one of the two?

A. I never memorized the analysis of any of the waters.

Recross by Mr. COE:

Recross-Q. 64. Would it make any difference in the effect on a patient whether he took sulphate of soda or sulphate of magnesia in large amounts?

A. I think it would.

Recross-Q. 65. So that as I understand you, a mineral water containing more sulphate of soda than sulphate of magnesia or *vice versa* would have a different effect on a patient; am I correct?

A. I think you are, sir.

Recross-Q. 66. Isn't Carlsbad water recognized among physicians as a standard sulphate-of-soda water?

A. It is recognized as a sulphate-of-soda water, sir.

(Examination closed.)

(Signature waived.)

240 GEORGE B. FOWLER, sworn and examined for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?
A. George B. Fowler; age, 50; residence, 18 East Fifty-eighth street; occupation, physician.
Q. 2. Are you a practicing physician in the city of New York?
A. Yes, sir.
Q. 3. How long have you been such practicing physician?
A. About twenty-seven years.
Q. 4. Have you ever occupied any public position here in the city of New York?
A. Yes, sir.
Q. 5. Of what kind?
A. I am at present the professor of medicine in the Postgraduate medical school and hospital. I was for thirteen years visiting physician to the New York infants' asylum, and I have been since 1886 the visiting physician to Bellevue hospital and I am at present the medical health commissioner of the city of New York.
Q. 6. Are you acquainted with the complainant's bitter water known as Hunyadi Janos water as it is sold in the market here?
A. I am familiar with the water called Hunyadi Janos water, yes.
Q. 7. Do you know the general style of bottle and label in which it has been sold?
A. Yes, I am familiar with it.
Q. 8. Have you used that water yourself or prescribed it?
A. Yes, sir; I have used it personally and prescribed it a great deal.
Q. 9. How long have you known it?
A. I remember it distinctly. I graduated in 1870, and it
241 was on the market then and I used it as it was used generally by the profession.
Q. 10. You have used and prescribed it ever since?
A. Ever since, yes.
Q. 11. Can you state whether it is sold or used in large quantities here?
A. I have an idea that it is.
Q. 12. What is its position among bitter waters?
A. As being a well-established cathartic water.
Q. 13. Under what name have you known this Hunyadi water here?
A. Under the name Hunyadi Janos.
Q. 14. Have you known it under any other name?
A. I don't remember that it ever had any other.
Q. 15. When you prescribe it, how do you usually prescribe it?
A. Always Hunyadi Janos.
Q. 16. Have you heard the term Hunyadi water spoken of or mentioned?

A. Yes, but I have always thought it was Hunyadi Janos. I didn't know there was any other kind of Hunyadi.

Q. 17. So that whenever you heard of the term Hunyadi water, you thought it synonymous with Hunyadi Janos?

A. Yes.

Q. 18. Have you found the name Hunyadi water mentioned or spoken of very frequently?

A. Yes, I have heard it spoken of very frequently.

Q. 19. Do you recognize the bottle and label which have been used for this water (pointing to Exhibit Complainant's Bottle)?

A. In a general way, yes. I don't know as I could detect any counterfeit label or close imitation of the bottle as to shape or size. I have a general idea that it is labeled something like that (pointing to Exhibit Complainant's Bottle).

242 Q. 20. You mean the blue and red label before you?

A. The blue and red label; yes.

(Direct examination closed.)

(No cross-examination.)

(Signature waived.)

GEORGE H. ENGELHARD, sworn and examined for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. State your name, age, residence and occupation.

A. George H. Engelhard; age, 27; residence, 57 East Sixty-fourth street, New York city; occupation, attorney and counsellor at law.

Q. 2. Are you employed in the office of Briesen & Knauth, the complainant's solicitors?

A. I am.

Q. 3. Are you acquainted with the various suits which the complainant has brought against druggists in this city and in Brooklyn for the purpose of obtaining injunctions for the unlawful use of the name Hunyadi, in connection with the sale of their bitter waters, than Hunyadi Janos water?

(Objected to as incompetetent, irrevelant and immaterial.)

A. I am.

Q. 4. Can you state what such suits have been brought, against whom and where?

(Same objection.)

A. We brought one suit in the United States circuit court for the southern district of New York, against Paul Treutler, a druggist. There was another one in the supreme court of the State of New York, city and county of New York, against Samuel Kogan

243 and Victor Kogan. Then we had the suit of Emilie Saxlehner, against Aaron Gordon and Ary Flaks, which was also in the New York supreme court, city and county of New York; and

another suit of Emilie Saxlehner, against Louis F. Roediger, which was also in the supreme court, city and county of New York.

Q. 5. Are you familiar with these suits?

(Same objection.)

A. I am, sir.

Q. 6. What became of them, and what happened?

(Same objection.)

A. In all of these four suits final decrees were entered perpetually enjoining the various defendants from selling, using or offering for sale bitter waters under the name Hunyadi, or any name or designation in which the name Hunyadi occurs; and also enjoining them specifically from the use of the name Hunyadi, with whatever attribute that had been found guilty of using. The suits were all started for the purpose of obtaining such injunctions, and in all these cases the defendants admitted having sold bitter waters as Hunyadi Janos, when they were Hunyadi Matyas, or Hunyadi Lajos or Hunyadi Aesculap. In two instances—the case of Treutler and Roediger—the defendants were at the office of Briesen & Knauth, personally, and admitted having sold the bitter waters under names other than Hunyadi Janos, when Hunyadi Janos was demanded from them. In the other cases, as also in these two cases just referred to, the defendants did not introduce any answers, and admitted the allegations of the complaint so that judgment was taken against them for the relief demanded in the complaint.

(Complainant's counsel asks defendant's counsel whether he will waive production of the judgments in these various cases, of course reserving his objection which he has made to the testimony.

Defendant's counsel replies that he will waive the production of the documents referred to, of course reserving and insisting on the objections above made, if complainant's counsel will admit
244 specifically that in all these cases judgments were substantially obtained by default or without a contest on the merits.

Complainant's counsel admits this.)

(Signature waived.)

(Adjourned to Saturday, October 9, at 12 o'clock, noon.)

NEW YORK, *October* 9, 1897.

Met pursuant to adjournment.
Present: Counsel as before.

AUGUSTUS CAILLE, sworn and examined for complainant, testifies as follows:

By Mr. KNAUTH:

Q. 1. Will you please state your name, age, residence and occupation?

A. Augustus Caille; I am 44 years old; I am physician and live at 753 Madison avenue, New York city.

Q. 2. Are you a practicing physician in the city of New York?

A. I am.

Q. 3. How long have you been practicing medicine here?

A. Twenty years.

Q. 4. Where did you conduct your studies before that time?

A. I studied in Germany and graduated in Germany and subsequently at the College of Physicians and Surgeons.

Q. 5. Have you in the course of your practice become familiar with the bitter water known as Hunyadi Janos water?

A. Yes; I have prescribed it, I suppose, for twenty years, during the term of my practical life as a physician.

Q. 6. Did you during that time always use it—that is from time to time—as a remedy for constipation or laxative?

A. Yes, up to the present time.

245 Q. 7. Under what name or names have you known this water here in the United States?

A. Hunyadi Janos.

Q. 8. Have you known it under any other name?

A. Well, sometimes I would simply order Hunyadi.

Q. 9. Whenever you prescribe a bottle of this water to your patients do you do it orally or by a written slip?

A. Sometimes in writing by means of a prescription and at other times I simply order Hunyadi and ask them to purchase it.

Q. 10. When you prescribe to one of your patients a bottle of Hunyadi what do you expect your patients will get?

A. I only know of one preparation and I am only familiar with one preparation, and that is Hunyadi Janos.

Q. 11. So that whenever you prescribe a bottle of Hunyadi you expect that your patients will get a bottle of Hunyadi Janos water?

A. Yes, sir.

Q. 12. Have you been familiar with the label or style of bottle in which that water has been on the market here?

A. Well, I am familiar with the general appearance; I haven't made it a special study but I am familiar with the general appearance.

Q. 13. Do you recognize this as one of the bottles with which you have been familiar (showing witness Complainant's Exhibit Complainant's Bottle)?

A. Yes; I should think that that would be a bottle of Hunyadi Janos.

Q. 14. Have you been familiar with the general red and blue label that this bottle has borne?

A. Yes, that is the impression I have of it.

Q. 15. How long have you known this water in such bottles and with such labels?

A. If my memory is correct I have always known it since I have prescribed it.

246 Q. 16. Is the water largely sold and consumed in the United States?

A. I believe so; it seems to be a very popular preparation.

Q. 17. What position does it hold among the bitter waters which are used as laxative remedies, so far as you know?

A. I guess it is considered the most active of the waters.

Q. 18. What do you mean by active?

A. Active as a laxative.

Q. 19. Do you know how it compares as to extent of its use or trade with other bitter waters which are sold in the market?

A. I don't know anything about the commercial aspect of the water.

(No cross-examination.)
(Signature waived.)
(Complainant rests.)

247 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER
vs.
EISNER & MENDELSON CO.

EMILIE SAXLEHNER
vs.
SIEGEL-COOPER COMPANY.

EMILIE SAXLEHNER
vs.
RUDOLPH GIES.

EMILIE SAXLEHNER
vs.
LOUIS MARQUET.

Testimony on behalf of complainant, in rebuttal, taken before John A. Shields, Esq., one of the standing examiners of the court, at the office of Messrs. Briesen & Knauth, No. 229 Broadway, New York, on Friday, March 18, 1898, at 11 a. m.

Appearances.

Antonio Knauth, Esq., for complainant.
Charles G. Coe, Esq., for defendants.

248 CASWELL A. MAYO, called as a witness for complainant, having been first duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Caswell A. Mayo; age, 35; residence, 1176 Jefferson avenue, Brooklyn; I am editor of the American Druggist and do other newspaper work besides.

Q. 2. Have you ever been connected with the paper called the Druggists' Circular and Chemical Gazette?

A. I have; I was connected with it for five years.

Q. 3. In what years?

A. From 1887 to the early part of 1892.

Q. 4. In what manner were you connected with that paper?

A. I was a reporter, or assistant editor they called me.

Q. 5. Have you ever been connected with the paper called the Oil, Paint and Drug Reporter?

A. Yes, sir; I was.

Q. 6. During what years?

A. During the year 1892; I was a reporter.

Q. 7. Have you, at the request of Mr. Kalman Saxlehner, examined the files of the following trade papers referred to by the witness Eisner in this case, namely, Deutsch Amerikanische Apotheker Zeitung, Mineral Waters, San Francisco Daily Report, Journal of Balneology, Grocers' Monthly Review, Oil, Paint and Drug Reporter, American Druggists' Circular and Pharmaceutical Review, for the purpose of ascertaining how often the several advertisements shown by the witness Eisner in said papers have been inserted, and what space they consumed?

A. I did, with the exception of Mineral Waters, the Journal of Balneology, which I believe is the same, the San Francisco Post and the Pharmaceutical Review, in none of which I could see the files or were they accessible, but in the case of the others I have examined them.

249 Q. 8. Now, please take them up successively and state what advertisements of the Eisner & Mendelson Company you found in the course of this search.

A. I will have to see the memorandum I made up. (After referring:) Merely state what advertisements are in it?

Q. 9. No, commence with the first of them; give the substance of your report.

A. I will give it in English. The German-American Apothecary Gazette, published monthly at 104 John street, New York, circulates exclusively among the German-American drug trade, circulation about 2,500 copies; that circulation is an estimate. Eisner & Mendelson published in it a page advertisement for seventeen consecutive issues.

Q. 20. Do you mean like defendant's Hunyadi Matyas apothecary advertisement?

A. Yes, sir; that is it; substantially the same—in fact, I think it is the same. It was begun with the issue in May, 1890, and concluded with the issue of September, 1891.

Q. 21. Are you acquainted with the rates which are charged by this paper for such advertisements?

A. I am.

Q. 22. Can you state what the expense of such advertisement in said paper was?

A. It was probably not more than $170; it was certainly not more than $425.

Q. 23. What is the next paper which you have examined?

A. The Grocers' Monthly Review.

Q. 24. Have you looked up the advertisements marked Defend-

ant's Exhibit Hunyadi Matyas Grocers' Advertisement in said paper?

A. Yes, sir.

Q. 25. How often was that published?

A. I have the dates down here; a quarter of a page in October, November and December, 1891; the same in January, February, March, April, May and June of 1892, and April, May, June,
250 July, August, September, October, November and December, 1893; January and February, 1894; April, May, June, July, August, September, October, November and December, 1896, and January, February and March, 1897.

Q. 26. I notice that the list of months given by you is not as comprehensive as the list marked Defendant's Exhibit Lissner Grocers' Matyas List. Did you look at each monthly issue of that paper to find such advertisement?

A. I don't know whether I did or not in that case. In that particular instance, I don't know whether I did or not. I may have overlooked some of the months.

Q. 27. You don't know at present?

A. Not without a memorandum, which I haven't with me.

Q. 28. From that memorandum you could refresh your recollection on that subject?

A. Yes, sir; I thought that I had it all here, but I have not.

Q. 29. Now please state whether you are acquainted with the rates charged by this paper for advertising.

A. I am.

Q. 30. Have you computed the cost of the advertisements which you have stated?

A. Well, according to their full card rates, they are supposed to be $275.

Q. 31. Is it customary to make any deductions therefrom?

A. It is.

Q. —. What reductions are customary?

A. Well, they vary in the different journals; I can't say what the reduction is now.

Q. 33. What is the next paper in which you looked up such advertisements?

A. The Oil, Paint and Drug Reporter.

Q. 34. Have you examined how often Defendant's Exhibit Hunyadi Water Drug Reporter Advertisements were inserted in this trade paper?

A. I have; I found that Eisner & Mendelson, on Septem-
251 ber 26, 1892, inserted a page advertisement, one-half of which was devoted to the quotation of prices on Hunyadi waters. The price for this half page would be $25 an issue; they had one issue.

Q. 35. What is the next paper which you examined?

A. The American Druggist; that was published by William Wood & Company at that time.

Q. 36. Have you examined how often Defendant's Exhibit American Druggist Advertisement was published in that paper?

A. Yes, sir; Eisner & Mendelson inserted a page advertisement in this paper in July, 1890, and in August, 1890, for which they paid $50. I know that from the books of the American Druggist.

Q. 37. Have you examined any other paper?

A. The Druggists' Circular, now published at 100 William street, formerly 72 and 74 William street.

Q. 38. Have you examined how often Defendant's Exhibit Druggists' Circular, July, 1890, Advertisement was published by the defendant in that paper?

A. Yes, sir; I found their advertisement in the issues of July, August and September, 1890, occupying three-quarters of the page, and then the following: They had in 1892, one-eighth of a page devoted to Hunyadi. May I say that when I refer to advertisement, I mean simply the advertisement devoted to Hunyadi waters at present. This is a page devoted to the Hunyadi waters, they having in some cases used a portion of the same advertising space for other waters. In 1892, June, one-eighth of a page; July, one-eighth of a page; August, one eighth of a page; September, one-quarter of a page; October, one-quarter of a page; November, one-quarter of a page; December, one-quarter of a page; 1893, January, one-quarter of a page; February, one-quarter of a page; 1894, January, a half page; 1895, January, one-quarter of a page; February, one-quarter of a page; April, one-quarter of a page; 1896, July—now
252 these advertisements in 1896, while they occupy three-quarters of a page, were during the time when I was with this journal, charged for at a full page, and I therefore put them down as full pages, the balance of the page being occupied by reading matter. 1896, July, one page; August, one page; September, one page; October, one page. 1897, January, one page; February, one page; April, one page, and June, one page. I did not find any in December, 1893; it is barely possible that I may have passed it, but I went over it rather carefully.

Q. 39. Do you know the advertising rates of that paper?

A. I do.

Q. 40. Have you computed the cost of advertising in this paper as examined by you?

A. I have.

Q. 41. What was it?

A. For those which I have mentioned the cost was certainly not more than $1,512.75; it was probably about $1,075, the difference between these rates being the difference between the short-term rates and the longer-term rates. It is possible that, while the advertisement was inserted for only a month or two at a time, they had a contract on the long-term rate and were given the lower cost.

Q. 42. There is also an advertisement produced by defendant marked Defendant's Exhibit Mineral Water Journal Advertisement, consisting of one page of March, 1890. Can you state what the expense of that advertisement was?

A. I can only give an estimate; I don't know absolutely the cost, but judging from similar publications and my knowledge of them, I would state that it probably did not cost more than $35.

Q. 43. There was also an advertisement produced by defendant marked Hunyadi Matyas San Francisco Advertisement. Can you state what the expense of that advertisement was?

A. I have seen the rate card of this paper, and computed
253 on that basis the cost would be $54.60. It was usual to get a reduction on those rates, and probably it only cost about $45.

Q. 44. Defendant has also produced a one-page advertisement marked Defendant's Exhibit Hunyadi Matyas Journal of Balneology Advertisement. Can you state what the expense of that advertisement was?

A. For a single issue I should say from my general knowledge of the cost of advertising of that character that it was probably not more than $35.

Q. 45. Defendant has also produced several so called reading notices, one of which was marked Defendant's Exhibit Chicago Journal Notice. Can you state what the expense of those notices was?

A. It was customary to insert such notices without cost.

Q. 46. You know that from your experience in the newspaper business?

A. My experience in the newspaper business leads me to state that it was customary to insert such notices without charge. In the case of the notice marked Defendant's Exhibit Druggists' Circular Notice, I can state from experience on that particular paper that such notices were not charged for.

Q. 47. The defendant claims to have had an advertisement in the Pharmaceutical Review for about a year beginning 1891; assuming that the advertisement filled a whole page, can you state what the cost of such advertisement was?

A. According to the card rate of this publication it would have been $200 for the entire year.

Q. 48. Have you computed the total cost of advertising as testified to by you in the foregoing testimony?

A. I have.

Q. 49. How much was it?

A. $2,501.35.

254 Cross-examined by Mr. COE:

Cross-Q. 50. Is your calculation as to the cost of the advertisement in the Druggists' Circular based on an eighth or quarter pages of the several issues you have spoken of?

A. It is not.

Cross-Q. 51. What is it based on?

A. It is based upon the page price.

Cross-Q. 52. Do you mean to say that where you have stated that these advertisements in the Druggists' Circular occupied one-eighth or one-quarter of a page, they absolutely occupied that space, or are you not mistaken, and did not these advertisements occupy more than that space?

A. As I stated, the advertisement of Eisner & Mendelson in some cases occupied much more than that space. The advertisement of Hunyadi Matyas occupied the space given in each instance.

Cross-Q. 53. Was not the advertisement of the Eisner & Mendelson Company generally one full page?

A. It generally was.

Cross-Q. 54. On what did you base your estimate of the cost of the advertisement in the Journal of Balneology of $35?

A. On my general knowledge of the cost of advertising in similar journals; journals going to the medical profession.

Cross-Q. 55. What do you know or what did you know of the circulation of this journal?

A. I only knew of the circulation by general repute without any specific knowledge of it.

Cross-Q. 56. If you were told that this Journal of Balneology circulated from fifty to eighty thousand copies of each issue, would that change your estimate of the cut?

A. If it were proven to me that they circulated between eighty and one hundred thousand copies, it would.

Cross-Q. 57. No, fifty to eighty?

A. If it were proven to me that the circulation of every issue was from fifty to eighty thousand, it would change my estimate,
255 but if there were only occasional issues of fifty to eighty thousand it would not change my estimate.

Redirect by Mr. KNAUTH:

Redirect Q. 58. Is it the fact that, whenever you looked up advertisements of the Eisner & Mendelson Company, as testified by you, you confined your attention to those portions of the advertisements which related to Hunyadi waters and did not include in the computation advertisements of Hoff's malt extract and other articles contained in such spaces?

A. No, I did not. That explains the change in the figures given in other advertisements in the Druggists' Circular. That portion of the space was used for other purposes than the Hunyadi waters.

Redirect Q. 59. Do I understand you to testify that the advertisements of which you have calculated the cost here relate to Hunyadi waters?

A. Yes; that is the idea.

Redirect Q. 60. That is all that you were able to find in the pages of those papers you examined?

A. Yes.

Signature waived.

(Complainant's counsel offers in evidence the two advertisements of the defendant in the Druggists' Circular and Chemical Gazette of March, 1890, and June, 1890, heretofore marked for identification Eisner's Change of Label, the same being pasted upon one sheet of pasteboard and they are marked "In Evidence, March 8, 1898, J. A. S., ex'r.")

256 HERMANN ENDEMANN, called as a witness for complainant, in rebuttal, having been first duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Hermann Endemann; I am 55 years of age; I live at 410 Greene avenue, Brooklyn, and keep a chemical laboratory at No. 23 William street, New York city, where I do analytical and chemical work.

Q. 2. Please state what studies in chemistry you have made and what experience as an analytical chemist you have had.

A. I have been at the polytechnic in Hessekassel studying chemistry, later on in the universities of Giesen and Marburg, where I graduated as doctor of philosophy; after this I took a position as tutor in chemistry at the polytechnic in Stuttgart, and three years later I came to the United States and took a position as assistant with Professor Chandler at the school of mines, Columbia college; later I was connected with the health department for twelve years, and in the year 1879 I opened a chemical laboratory at 33 Nassau street. The chemical laboratory was later on moved to the present place. The examination of waters has been a specialty with me ever since the year 1865.

Q. 3. Have you since that time frequently made analyses of both mineral waters and drinking waters, and do you consider yourself competent to testify as to the results of such analyses?

A. I have made frequent examinations of mineral waters and potable waters ever since the year 1865. I have, for instance, examined the thermal springs of the Kingdom of Wurtemberg, I also made for a number of years weekly chemical analyses of the Croton water and the Ridgewood water, and I have examined the water of hundreds of wells and the supplies of many cities in the United States.

Q. 4. You consider yourself competent to testify?

257 A. Yes. I have also examined mineral waters, imported and artificial, and I believe I can consider myself a competent person to examine mineral waters.

Q. 5. Did you recently, at the request of Mr. Kalman Saxlehner, purchase a quantity of Hunyadi Matyas bitter water, as it is sold by the defendant The Eisner & Mendelson Company, in the open market?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. I did so on February 24th of the present year, when I purchased the Hunyadi Matyas mineral water from the Crittenton Company, in Fulton street, this city.

Q. 6. State what you purchased; produce one of the bottles if you can.

(Mr. COE: Same objection.)

A. I purchased one dozen of Hunyadi Matyas and the bottle

which I hold in my hand is one of the bottles which were so purchased and which held the water which has been analyzed.

(Mr. Coe: The last clause of the answer is objected to as immaterial and irrelevant and not proper rebuttal testimony.)

Q. 7. Were the labels on all these bottles alike and like the label on the bottle which you have produced?

(Mr. Coe: Objected to as immaterial and irrelevant.)

A. They were all alike and each bottle was enclosed in a brownish wrapper without any printing.

Q. 8. Did all of these bottles bear a metal capsule with the portrait or bust of a crowned king?

A. They did.

(Complainant's counsel offers in evidence the bottle produced by the witness, and the same is marked Complainant's Exhibit Endemann Bottle, March 18, 1898, J. A. S., ex'r.

Defendant's counsel objects to the introduction of this bottle as immaterial and irrelevant.)

258 Q. 9. Did you make an analysis of the water contained in this bottle, and in bottles which you purchased at the same time, together with this bottle as testified to by you?

(Mr. Coe: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal testimony.)

A. I did.

Q. 10. Please state what the result of that analysis was?

(Mr. Coe: Same objection.)

A. The result of the analysis was that I found that it contained in one litre:

Of sulphate of magnesium anhydrous	13.762	grammes.
Of sulphate of soda	13.831	"
Of sulphate of lime	0.774	"
Of chloride of sodium	2.177	"
Of carbonate of potassium	0.072	"
Of carbonate of sodium	0.553	"
Of carbonate of lime	0.082	"
Of carbonate of iron	0.012	"
Of phosphate of soda	0.003	"
Of nitrate of potash	0.019	"
Of silica	0.040	"
In all	31.335	grammes.

It contains also in one hundred thousand parts ammonia 0.0014, albuminoid ammonia, 0.0426, and the oxygen required to oxidize organic matter was determined in two different bottles; in the first it was 1.3268, and in the second bottle 1.5374.

Q. 11. Does the list of ingredients which, computed together,

make the sum of 31.325 grammes of solids mean 31.325 grammes in one thousand parts?

(Mr. COE: Same objection.)

A. Not exactly, on account of the water having a slightly higher specific gravity than pure water; the sum total calculated upon one thousand parts, will be less than 31.325.

259 Q. 12. Now please compare the result of your analysis of this water with the analysis contained on the bottle Complainant's Exhibit Endemann Bottle.

(Mr. COE: Same objection.)

A. As far as the total constituents are concerned, it contains only about three-fifths of the total solids which it ought to contain according to the label on the bottle. The amount of sulphate of magnesia found in the water is about one-half of the sulphate of magnesia which it should have contained according to the label on the bottle. The amount of sulphate of soda is about 14/17ths of the amount indicated on the bottle, and the amount of chloride of sodium is only about one-half what it should contain according to the label on the bottle. The sodium carbonate is about one-fifth of what it should contain according to the label on the bottle. The calcium sulphate is a trifle higher than the quantity which it should contain according to the bottle and the silicic acid is about one-fourth of what it should contain according to the bottle. I also find that the phosphate of soda and the nitrate of potash and the carbonate of lime are not considered in the analysis as it is given on the bottle.

Q. 13. Do you find any iron indicated in the analysis contained on the bottle?

(Mr. COE: Same objection.)

A. There is also no iron indicated on the bottle, while the water which I examined contained iron.

Q. 14. How much iron does the water contain which you have examined?

(Mr. COE: Same objection.)

A. Carbonate of iron, calculated from the amount of iron, amounts to 12 milligrams in one litre of Hunyadi Matyas examined.

260 Q. 15. Is it your opinion that the waters described in the analysis on the bottle and the waters you have analyzed are different and distinct waters, or are they substantially the same?

(Mr. COE: Same objection.)

A. It is my opinion that this is a decidedly different water. In the first place it is weaker, but this dilution could not have been brought about by the addition of pure water for the reason that the proportions of the constituents which it contains are not the same as on the label on the bottle.

Q. 16. Did you not find a large preponderance of magnesia sulphate as compared with soda sulphate on the bottle?

(Mr. Coe: Same objection.)

A. As I stated before, the sulphate of magnesia found in the water is only about one-half of the quantity of magnesium sulphate which the water should contain according to the bottle, while the sodium sulphate does not differ very much from the sodium sulphate as it should be according to the label on the bottle.

Q. 17. What does the presence of ammonia and albuminoid ammonia stated by you, in the water analyzed by you, indicate to you?

(Mr. Coe: Same objection.)

A. That the water is partly derived from surface sewage, the quantity of albuminoid ammonia is over twice as high as it should be according to some authorities on potable waters.

Q. 18. You mean twice as high as is good for health?

A. Yes.

Q. 19. If the water analyzed by you should become denser by evaporation and then be analyzed in the spring, could it show an analysis such as is shown on the bottles of Hunyadi Matyas water?

(Mr. Coe: Same objection.)

A. It could not, inasmuch as the concentration would not disturb the relative proportions of the substances determined.

Q. 20. Defendant's witness Eisner produced an analysis of
261 the original Hunyadi Matyas spring contained in a book in his possession which he read in answer to cross-Q. 922. Please compare that analysis with the analysis on the bottles of Hunyadi Matyas water such as you purchased and analyzed and tell us whether the waters are the same or substantially the same or not.

(Mr. Coe: Same objection.)

A. These waters are not the same. The analysis produced by Mr. Eisner seems to indicate that the quantities given are calculated on ten thousand parts, while I have calculated my own analysis on about one thousand parts. As far as the proportions are concerned I find that the quantity of chloride of sodium is about one-quarter of the quantity of chloride of sodium which the Hunyadi Matyas should contain according to the label; the sulphate of sodium is approximately the same, while the magnesium sulphate is about one-third of that which is indicated upon the label.

Q. 21. Did you not find that the proportions of magnesia sulphate and soda sulphate as shown by the analysis produced by Mr. Eisner and compared with that on the labels on bottles of Hunyadi Matyas water are just about reversed?

(Mr. Coe: Same objection.)

A. I should say so; yes.

Q. 22. Would this indicate to you that the waters came from different springs or wells?

(Mr. COE: Same objection.)

A. It would certainly indicate that they came from different springs or wells.

Q. 23. Now, please compare the analysis of the Hunyadi Matyas spring shown on page 9 of the pamphlet of Mattoni & Wille, entitled "Chemische Analyse," with the analysis of the Hunyadi Matyas spring produced by Mr. Eisner and testified to by him.

(Mr. COE: Same objection.)

262 A. The analysis in the pamphlet and the analysis produced by Mr. Eisner are very similar. The one, however, produced by Mr. Eisner is calculated upon ten thousand parts, while the analysis in the pamphlet is calculated to one litre or approximately one thousand parts.

Q. 24. Do these two analyses indicate to you that they were made of the same well or spring?

(Mr. COE: Same objection.)

A. I should say that they were, only the examination quoted in the pamphlet seems to be more elaborate in its nature, inasmuch as it contains substances which are not mentioned in the other analysis.

Q. 25. Do you find in both these analyses bicarbonate of iron, and, if so, to what extent?

(Mr. COE: Same objection.)

A. I find in the pamphlet the quantity of bicarbonate of iron to be 0.124 and in the analysis quoted by Mr. Eisner and then calculated to one thousand parts 0.1207.

Q. 26. Is that substantially the same quantity?

A. They are substantially the same quantities.

Q. 27. About this water called Hunyadi Matyas, the pamphlet of Mattoni & Wille states, on page 9, as follows: "As is shown by the following analysis, this water is distinguished by an exceeding wealth of bitter salt and Glauber salt, which gives it the character of an eminent bitter water, but the amount of carbonate of iron which it contains also gives it a high therapeutical importance. This valuable ingredient makes the spring a specific under all known bitter springs and the cases in which it may be indicated may be increased considerably as compared with those bitter waters which are used simply on account of their sulphates of sodium and magnesia." Is that correctly translated from the pamphlet?

(Mr. COE: Same objection.)

A. It is the same as the pamphlet.

263 Q. 28. Do you find any such carbonate or bicarbonate of iron indicated on the analysis of the bottles of Hunyadi Matyas water which you have purchased?

(Mr. COE: Same objection.)

A. I do not.

Q. 29. Do you find any carbonate or bicarbonate of iron in the water of that bottle which you have analyzed, as testified to by you, and, if so, to what extent do you find this substance?

(Mr. COE: Same objection.)

A. I found only about one-tenth of the amount of iron indicated on the label.

Q. 30. You mean one-tenth of the amount of the iron which was stated in the pamphlet and in the analysis produced by Mr. Eisner.

(Mr. COE: Same objection.)

A. Yes, sir.

Q. 31. Would this one-tenth amount of iron be sufficient to give the water any therapeutical importance as stated in the pamphlet?

A. I should much rather leave that to a physician to decide.

Q. 31½. Have you read and do you understand the various analyses which are stated in Mattoni & Wille's pamphlet for their six different springs called, respectively, No. 1, St. Stefan's bitter spring; No. 2, Franz Deak bitter spring; No. 3, Heinrich bitter spring; No. 4, Hunyadi Matyas bitter spring; No. 5, Graf Stefanszechenyi bitter spring, and No. 6, Hildegard bitter spring, and do you understand the same?

(Mr. COE: Same objection.)

A. I have and I do.

(Recess until 2 p. m.)

264 NEW YORK, *March* 18, 1898.

(*Afternoon Session.*)

Met pursuant to adjournment.
Present: Parties as before.

HERMANN ENDEMANN—direct examination continued.

By Mr. KNAUTH:

Q. 32. I call your attention to the analysis of the spring called Franz Deak bitter spring, which is contained in Mattoni & Wille's pamphlet of 1878, and request you to compare that analysis with the analysis on a label of Mattoni & Wille which I also show you. Please compare the two analyses and state whether they are identical or substantially the same or not.

(Defendant's counsel objects to the question as incompetent, immaterial and irrelevant, and not proper rebuttal testimony.)

A. The two analyses differ only in as far as the one is calculated on ten thousand parts of water by weight, in the case of the old label, and being calculated for one litre in the pamphlet mentioned. One litre, however, weighs 1,034.55 grams, consequently the water in the pamphlet would appear slightly stronger. If, however, we

calculate the figures given in the pamphlet from 1,034.55 grams to 1,000 grams we obtain exactly the same figures as those figures which we find on the label, with the exception that those on the label appear ten times as large for the reason that the label calculates for 10,000 parts instead of 1,000 parts. I have calculated the quantity of total solids which would be contained in 1,000 parts from the analysis in the pamphlet and find that under this supposition there would be contained in this water 41.057 grams, while the label states 41.043, which figure is obtained if you divide the 410.43 by 10. If you look at the proportion of the constituents
265 in the label and the proportions as they are given in the pamphlet we find that they are absolutely the same in both cases.

(Complainant's counsel offers the label shown to the witness for identification and the same is marked "Complainant's Exhibit Andres' Second Label for identification."

Defendant's counsel makes the same objections as above to the label so marked.)

Q. 33. Then I understand you to testify that the water of the Franz Deak spring, as shown by the analysis and description in Mattoni's pamphlet, is the same as that indicated in this analysis on the label marked "Andres' Second Label for identification"?

(Same objections.)

A. It is.

Q. 34. Please compare the analysis of the Hunyadi Matyas water which you have made with the analysis of the Franz Deak spring as shown by the pamphlet, and by Andres' second label, and state how it compares with the same.

(Same objections.)

A. The proportions between the constituents are practically the same. The analysis of the water which I analyzed, however, shows that it is only three-quarters of the strength of the Franz Deak bitter water as described in the pamphlet.

Q. 35. Is the strength of the water of a natural well varying in accordance with different atmospheric conditions?

(Same objections.)

A. It does in some cases. In other cases it does not. When surface waters reach a spring of deep origin it frequently happens that the spring may vary according to season and atmospheric influences, as moist or dry seasons. In the wet seasons such springs will frequently show a smaller amount of solids than in dry seasons.

Q. 36. Now, please compare the analysis of the Hunyadi Matyas water which you have made with the analyses of the other five springs of Mattoni & Wille which are stated in this pamphlet,
266 and state whether they tally with any one of these other five springs besides the Franz Deak spring or not.

(Same objections.)

A. The water which I analyzed does not compare with any of the other springs which are here given.

(Complainant's counsel offers in evidence the pamphlet of 1878 entitled "Chemische Analyse of Mattoni & Wille" and the same is marked "Complainant's Exhibit Mattoni's Pamphlet."

Defendant's counsel objects to the introduction of said exhibit as incompetent, immaterial, irrelevant and not proper rebuttal testimony.

Complainant's counsel states with reference to the objection of incompetency that he expects to prove that the pamphlet was issued by Mattoni & Wille by testimony to be taken hereafter.)

Q. 37. Please state whether this Franz Deak water of Mattoni & Wille according to the analysis of the label and of the pamphlet contains carbonate of iron or bicarbonate of iron?

(Same objections.)

A. According to the label it contains oxide of iron; according to the pamphlet it does not contain any oxide of iron.

Q. 38. What does the label state with reference to the presence of oxide of iron?

(Same objections.)

A. The oxide of iron of the label is not given by itself. It is put together with a small quantity of strontia contained in the water and also silicious and argillaceous earth traces.

Q. 39. All these taken together are indicated on the label by the figure 1.85?

(Same objections.)

A. They are.

Q. 40. What proportion of the total solids does this 1.85 for these several ingredients taken together represent?

(Same objections.)

A. Less than one-half per cent. of the total solids.

267 Q. 41. Which one of Mattoni's six different springs, according to the pamphlet, was the strongest? That is, containing the largest part of solids?

(Same objections.)

A. No. 1, St. Stefan's bitter spring, which contains in one litre 43.7199 parts.

Q. 42. How many total solids does the Franz Deak spring contain according to the pamphlet and the label?

(Same objections.)

A. 42.475 grammes in one litre or 41.057 parts in 1,000 parts by weight.

Q. 43. How many total solids does the so-called Hunyadi Matyas water in the bottles of the Eisner & Mendelson Company contain, according to the label on the bottles?

(Same objections.)

A. 52.426 parts in 1,000 parts by weight.

Q. 44. But you found only 31.125 parts solids in that water, did you?

(Same objections.)

A. This is the quantity which I found to be present in one litre.

(Direct examination closed.)

(Counsel for the defendant cross-examines the witness *de bene esse* and conditionally, without waiving his objections to the direct examination as set forth.)

By Mr. COE:

Cross-Q. 45. What is magnesia sulphate or sulphate of magnesia ordinarily called in the English language?

A. We call it sulphate of magnesia if it is without water of crystallization.

Cross-Q. 46. What is the ordinary every-day name for it?

A. I do not think that it is an article of commerce.

Cross-Q. 47. Is it not called ordinarily Epsom salts in common parlance?

268 A. Epsom salts is not sulphate of magnesia proper Epsom salts is sulphate of magnesia with water of crystallization.

Cross-Q. 48. What is sodium sulphate or sulphate of soda ordinarily called in the English language?

A. Sodium sulphate, the anhydrous; but there is also sodium sulphate with water of crystallization which is called Glauber salt.

Cross-Q. 49. What is sodium chloride ordinarily called in the English language?

A. Common salt.

Cross-Q. 50. Are not these three salts which you have named, Epsom, Glauber and common salt, the main constituents of the Hunyadi Matyas water analyzed by you?

A. These salts may be in the water when the solids are dissolved.

Cross-Q. 51. Do these three salts, Epsom, Glauber and common salt ordinarily come in the market in an anhydrous state or are they in crystals?

A. The sulphate of soda or Glauber salt comes in both forms, anhydrous as well as in crystals, and sulphate of magnesia is ordinarily found in the shape of crystals, with water of crystallization; the common salt is without water of crystallization.

Cross-Q. 52. If you take a litre of Hunyadi Matyas water and place it in a porcelain dish and allow all the water to evaporate in the open air would you have an anhydrous salt or a crystal salt left as a residue?

A. In the case of sulphate of magnesia, a salt with water of crystallization; in the case of sulphate of soda, a salt containing various quantities of water, according to the temperature at which the evaporation took place—in the summer with less and in the winter with more.

Cross-Q. 53. Would not this residue represent the chemical constituents of the water?

A. This residue would contain the constituents of the water plus varying quantities of water of crystallization.

269 Cross-Q. 54. Would that residue weigh more or less than the corresponding quantities of sulphate of magnesia, sulphate of soda and chloride of sodium, as in the Hunyadi Matyas water as analyzed by you?

A. It would certainly weigh more for the reason that it contains also water of crystallization.

Cross-Q. 55. How much more?

A. I would have to calculate Shall I do so?

Mr. COE: No; it is not necessary.

By Mr. KNAUTH:

Redirect Q. 56. Do you understand that the chemical analysis by Professor Joseph Bernath on the labels of the Hunyadi Matyas water, which gives a total of combined parts as 52.426 in 1,000, relates to the product obtained by a mere evaporation of the water, as described by defendant's counsel, or the products of a chemical analysis of the water?

A. I take it to be the product of a chemical analysis and to refer to the anhydrous salts.

Redirect Q. 57. Why do you take it to be the product of a chemical analysis and not the product of a mere evaporation?

A. Because there is nothing stating that this magnesium sulphate contained anything else than sulphuric acid and magnesia, and the sodium sulphate soda and sulphuric acid.

Redirect Q. 58. Is it a usual or proper method to state as a chemical analysis of such a water representing the solids contained in the water merely the product found by an evaporation of the water, as described by defendant's counsel?

A. It is certainly not. The evaporation of the waters for the purpose of chemical analysis is carried out at an elevated temperature, and the waters are dried at a temperature of above 100 degrees centigrade.

Redirect Q. 59. Does that leave the products anhydrous?

A. We generally carry the temperature to above 160 to

270 200 degrees centigrade, and in that case it leaves the products anhydrous.

Redirect Q. 60. I notice on Defendant's Exhibit "Hunyadi Matyas 1877 Trade-mark," there is attached a pamphlet of Mattoni & Wille which gives a picture of the red and white label referring to the Hunyadi Matyas spring and an analysis by Prof. Bernath. This analysis contains after the words "sulphate of magnesia" the words in parenthesis "bitter salt," and after the words "sulphate of soda" the words in parenthesis "Glauber salt." Would these words in parentheses change the view you have taken of this analysis and the testimony you have given with reference thereto?

A. They would not, for the reason that if anybody does not mean sulphate of magnesia, but wants to indicate sulphate of magnesia

with water of crystallization, he would be foolish in reporting the analysis to add the name of bitter salt or Glauber salt. Comparing it with the analysis which I have made of the water I would get decidedly more Glauber salt if that view was taken than is intimated on the label on the bottle.

Redirect Q. 61. And how about the bitter salt?

A. The bitter salt would be approximately as much as stated on the bottle, provided we calculate the sulphate of magnesia found by me as bitter salt. If I should calculate the quantity of sulphate of soda contained in the water which I analyzed as Glauber salt, the water would contain 31.36 parts of Glauber salt in one litre, which is almost twice as much as stated on the label.

Redirect Q. 62. That would make a totally different analysis from Prof. Barnath's, as stated on the label?

A. It would be an entirely different analysis than that stated on the label.

Redirect Q. 63. And would also produce a totally different total of solids contained in the water than that as stated by Prof. Bernath?

A. It would give the solids approximately about 70.

271 Redirect Q. 64. Instead of 52?

A. About 70 instead of 52.

Redirect Q. 65. You do not think that Prof. Barnath has been guilty of such juggling of analysis as to put the words Glauber salt and bitter salt upon the analysis himself?

(Objected to as without foundation in fact and asking for a conclusion.)

A. In view of the other analysis, I consider it at least doubtful.

Redirect Q. 66. You mean the other analysis by whom?

A. The other analysis quoted under his name.

(Signature waived.)

A. R. ELLIOTT, a witness called on behalf of the complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. A. R. Elliott; 46; general advertising agency; 451 West End avenue is my residence, my business is at 66 Broadway.

Q. 2. How long have you been in the business of attending to advertising or attending to an advertising agency?

A. I have been in business about ten years. I have had a general advertising agency about ten years. I have been in newspaper work directly connected with advertising for about twenty years.

Q. 3. Are you acquainted with advertising in trade papers and particularly in drug papers?

A. Yes, sir.

Q. 4. And you are acquainted with the rates charged by such papers for advertising?

A. Yes. I have published a directory of all that class of papers under my own name, in which I give each paper in that line, the

circulation, as near as we could get to it and the rates charged per page per year.

272 Q. 5. Are you acquainted with the following papers: Deutsch-Amerikanische Apotheker Zeitung (German-American Apothecary Argosy), Mineral Waters, San Francisco Daily Report, Journal of Balneology, Grocers' Monthly Review, Oil, Paint and Drug Reporter, American Druggist and Druggists' Circular?

A. Yes, sir.

Q. 6. And know their advertising rates?

A. Yes, sir; I do business with all of them.

Q. 7. The complainant's witness Mayo has prepared a statement of the advertisements made by the Eisner & Mendelson Company in these papers concerning Hunyadi water and has testified to the same. Are you familiar with the statement?

(Objected to for the reason that the statement referred to has not been sworn to and put in evidence by the said witness Mayo.

Complainant's counsel offers the statement for identification, and the same is marked "Complainant's Exhibit Mayo Statement for identification.")

A. Yes.

Q. 8. Please examine the statement relating to the advertisements in these papers and state what the cost of making the advertisements described in this statement is or would have been.

A. I have examined Mr. Mayo's statement, Complainant's Exhibit Mayo Statement for identification, and am thoroughly acquainted with all the papers, and I am thoroughly acquainted with the rates, and I would say the card rates, that is, the long rate, that is the limit, what we call the card rate, on all those papers amounts to about twenty-four hundred dollars for the amount of advertising which that statement exhibits. I would say that I believe I can place it for fifteen hundred dollars. I say that eighteen hundred dollars would be a large agent's net price. I will say

273 that I will place that business and make a profit on it for eighteen hundred dollars.

(Defendant's counsel objects to the answer as immaterial.)

Q. 9. Among what class of the public do these papers circulate which I have recited to you?

A. They circulate to the trade, grocery trade and drug trade and oil, paints and glassware trade, some of them; but they go entirely to dealers.

Q. 10. Do they circulate among the general public or consumers?

A. Not at all, except as a dealer may be a consumer, but they are not papers that any man would use to create a demand with the public for his goods, they don't belong to the class of publications that any manufacturer would use in order to create a demand among consumers—not one of them.

(No cross-examination.)

A. R. ELLIOTT.

(Further hearing adjourned to Tuesday, March 21, 1898, at 11 o'clock a. m.)

NEW YORK, *March* 22, 1898.

Met pursuant te adjournment.

Present: Counsel as before.

ARTHUR MIDDLETON JACOBUS, a witness called on behalf of the complainant, in rebuttal, having been first duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Arthur Middleton Jacobus; age, 44; residence, 260 West Fifty-seventh street; physician; I graduated from Bellevue Hospital medical college in 1876.

274 Q. 2. Have you been a practicing physician since 1876 or thereabouts?

A. Well, only the first two years I was in the hospital service or in Germany, and I began private practice in 1879.

Q. 3. In the city of New York?

A. Yes; from 1876 to 1878 I was in the Presbyterian hospital, and from 1878 to 1879 the universities of Bonn and Wertsburg, Germany.

Q. 4. Have you ever prescribed any Hunyadi Janos water to your patients?

A. Yes, I have; on and off, I think, for eighteen or twenty years.

Q. 5. How long have you known that water?

A. I think since about 1878, before I began private practice—when I was in the hospital.

Q. 6. How did you prescribe it to your patients—under what name or names?

A. Well, Hunyadi water; and years ago I used to say Hunyadi Janos, but the name was so common and so well known that I used simply the ordinary name, Hunyadi water.

Q. 7. That has been your custom for how many years?

A. Up to a few days since, when I had occasion to prescribe some.

Q. 8. I mean how far back has that been your custom to so prescribe it?

A. Well, since 1879, although I think I used it myself in the hospital in 1878 or 1879, I am not sure which.

Q. 9. Have you known the label used on the bottles of such Hunyadi Janos water?

A. Yes; that is on the bottle here.

Q. 10. Like the red and blue label appearing before you?

A. Yes.

Q. 11. Do you prescribe that frequently to your patients?

A. Yes; quite frequently.

275 Q. 12. How does it rank among the bitter waters which are known and sold in the market here?

A. It seems to me it has always ranked as the leading one because

it is efficient and pleasant and agreeable to take and is easily obtained. It is on sale almost everywhere.

Q. 13. It has a large reputation?

A. Yes.

Q. 14. Are you only in private practice, Doctor, or do you also hold any public positions?

A. Well, I have held several positions. At the present time I am in private practice and connected with the outdoor department of the Presbyterian hospital in New York city. Of course, I am connected with various societies, but I suppose you mean as a physician.

Q. 15. What do you refer to when you prescribe Hunyadi water to your patients?

A. Well, I naturally refer to the Hunyadi Janos water, the water I am familiar with and have used so long.

Q. 16. And that has always been your habit and custom?

A. Yes.

Q. 17. Do you know the drug store of a druggist called Quencer?

A. Yes; it is on the southwest corner of Fifty-seventh street and Ninth avenue.

Q. 18. Do you ever send your patients to that drug store?

A. Yes; where patients have their regular drug store, I wouldn't send them anywheres else; but where they haven't, or where I have patients around, I generally send them to those stores near me or near where they live. I live, of course, right on the next block to Quencer's drug store.

Q. 19. Do you know, from inquiries at that drug store, that your patients frequently go there?

A. I judge so; they must; they live around there. Of course, there are other stores in the neighborhood also. I know
276 him, because I have received circulars from him about medical supplies, and so on, that he keeps and furnishes to physicians.

(Direct examination closed.)

Cross-examination by Mr. COE:

Cross Q. 20. You say you have prescribed Hunyadi Janos water during your practice for a number of years back. In what way do you prescribe it, by written prescription?

A. Sometimes by written prescription, sometimes verbally and sometimes either just simply put the name down on a paper, which I would not call a prescription, so that they won't forget it.

Cross-Q. 21. Isn't it your general practice to simply tell your patients to get a bottle of Hunyadi water?

A. Of late, generally so, but originally, not. Originally I was always particular to write it Hunyadi Janos; but, as I say, the name got familiar to me and to everybody, and it was spoken of as Hunyadi water, and so I wouldn't write it, but if the people and children might forget it, then I would write it out in full, or something like that.

Cross-Q. 22. You say in the early years of your practice you

always called it Hunyadi Janos water. Can you tell a definite time when you ceased to call it Hunyadi Janos water and commenced to call it Hunyadi?

A. No, I cannot; because I sometimes would write it down that way, even in the last year or so. It would depend somewhat on whom I was talking to. If the person was intelligent and so on, I would speak of it as Hunyadi water; if it was some one I thought didn't understand English well, or might make a mistake or something, I would write it out more fully. As a rule, in the last number of years in the majority of instances it would be just simply Hunyadi water.

Cross-Q. 23. You have been asked whether you are familiar with the label upon Hunyadi water and you have stated that the label on the bottle marked Complainant's Exhibit Complainant's
277 Bottle is the label with which you have been familiar; is that correct?

A. Yes, sir; this one here; this red and blue label (pointing to Complainant's Exhibit Complainant's Bottle).

Cross-Q. 24. Haven't you also known of Hunyadi Janos being sold under a label with the Diamond brand on as shown on the bottle Complainant's Exhibit Complainant's Former Bottle?

A. I have seen this. I think I have had circulars from the Apollinaris people that owing to infringements, or something like that, they had got out a label with a diamond on or something to distinguish it.

Cross-Q. 25. Can you tell how long ago that was?

A. No, I cannot; it may be ten years ago, it may be five; I don't know how long.

Cross-Q. 26. But you know that Hunyadi Janos was sold for a number of years back with the Diamond brand as shown on Complainant's Exhibit Complainant's Former Bottle?

A. Well, I have seen that in the drug-store windows, and I have had circulars about it, but I never paid attention to that particularly. I just wrote Hunyadi water or Hunyadi Janos water.

Cross-Q. 27. Have you known during the last ten years of any other Hunyadis on the market?

A. No, except as I might have perhaps picked up a bottle in the store and seen something; I have never known anything in the way of Hunyadi water but this water; I have seen bottles, I think, with Lajos or some other names; I presume they were waters sold by the same company, possibly a different spring in their ground or something like that, like different Saratoga waters.

Cross-Q. 28. But you have known nothing of the trade in Hunyadi waters other than Hunyadi Janos during the last ten years?

A. No.

Cross-Q. 29. And when you speak of prescribing Hunyadi
278 Janos as Hunyadi Janos water, and as Hunyadi, you only speak of your own personal experience?

A. My experience, certainly; I prescribed it as I have seen it or heard of it.

Cross-Q. 30. Do you recollect in past years ever seeing any advertisements of a water called the Hunyadi Matyas water?

A. No.

Cross Q. 31. Do you take the Medical Record?

A. I do.

Cross-Q. 32. During the last eight years you never recollect of seeing any advertisements of that water?

A. I do not; I am quite a man to look over advertisements, too; I take a good many journals.

Cross-Q. 33. Do you recollect the date when Hunyadi Janos ceased to be sold under the label Complainant's Exhibit Complainant's Former Bottle, with the additional Diamond Brand label on it, and commenced to be sold with the label without such additional Diamond Brand label?

A. No, I do not, because I did not go into that. I wasn't interested in any way except that I knew Hunyadi Janos water, and prescribed it under that name or the name Hunyadi water, and I didn't go into the details at all, or look into it especially. Not being interested in any way, of course I am not expected to keep track of any change or anything of that sort, agents or so on.

(Cross-examination closed.)

(Signature waived.)

(Recess until 2 p. m.)

279 (After recess.)

HENRY A. CASSEBEER, a witness called on behalf of the complainant, in rebuttal, having been first duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Henry A. Cassebeer; age, 53; residence, 205 West Seventieth street; occupation, apothecary.

Q. 2. Where is your drug store situated?

A. Corner of Seventy-second street and Columbus avenue.

Q. 3. How long have you been a druggist in New York city?

A. I was apprenticed in 1860.

Q. 4. When did you first go into business as a druggist on your own account?

A. I believe 1864 or 1865; at least I succeeded my father.

Q. 5. Do you know the Hunyadi Janos water of the complainant Emilie Saxlehner?

A. Yes, sir.

Q. 6. How long have you known of that water?

A. Since about 1868, 1869, or 1870, the end of the sixties.

Q. 7. Did you know it here at that time?

A. Yes, sir.

Q. 8. Did you buy or sell it?

A. I bought and sold it.

Q. 9. And from that time on have you continuously bought and sold it?

A. I have.

Q. 10. How was the water commonly demanded by the public?

A. Hunyadi water or Hunyadi Janos water or Hungarian bitter water. I think those were the three ways it was called for at that time.

Q. 11. When a person came to your drug store demanding a bottle of Hunyadi water, what would you give him?

280 A. Hunyadi Janos.

Q. 12. Has that always been the case since the time when you first commenced to sell this water?

A. Yes, with the exception of about ten or twelve years ago there was a water, I believe, imported. I think it was Hunyadi Arpad, and during my absence a case or two was bought by my head man and was sold, but coming back I stopped the sale of it, because I didn't feel inclined to sell anything but what the people wanted to have.

Q. 13. Did you ever sell the Hunyadi Matyas water of the defendant, The Eisner & Mendelson Company?

A. I couldn't say whether it was Arpad or Matyas or something of that kind; I couldn't say.

Q. 14. You mean the water which you have just referred to now?

A. Yes, it must have been about ten or eight years ago; I can't say exactly. I know it was during my absence, once when I was away.

Q. 15. That was only a single instance in which you sold one of those waters?

A. To the best of my recollection, yes.

Q. 16. Otherwise you have always had in stock and sold only the Hunyadi Janos water and solely under the description of Hunyadi water?

A. Yes, sir; I believe on one or two other occasions some other Hunyadi waters were asked for, and we had to buy them in the lots that were asked for by our customers, but when they were called for under those names we bought them. I don't know what kind of names they were.

Q. 17. Are these customers for Hunyadi water frequently sent by physicians to your drug store?

A. Once in a while; yes.

Q. 18. Then, if I understand you correctly, you have always understood, and still understand, the term Hunyadi water to refer to complainant's Hunyadi Janos water?

281 (Mr. Coe: Objected to as leading and not a fair statement of the witness' previous testimony.)

A. Yes, sir, I know this Hunyadi Janos water, and when the people ask for Hunyadi water they invariably—at least, I believe they do—want Hunyadi Janos water.

Q. 19. Has that Hunyadi Janos water been largely advertised in the United States?

A. I have seen it advertised widely.

(Direct examination closed.)

Cross-examination by Mr. COE:

Cross-Q. 20. Haven't you had Hunyadi Matyas water in stock for some years back?

A. As I said, some years ago we did, yes.

Cross-Q. 21. Didn't you have calls for it while you had it in stock?

A. I may have had calls for it.

(Cross-examination closed.)
(Signature waived.)

CASWELL A. MAYO, recalled for complainant, in rebuttal, further testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. You have referred in your direct testimony heretofore given in this case to a memorandum prepared by you with references to your inquiries as to the advertisements of the Eisner & Mendelson Company, testified to by Mr. Eisner; is the memorandum which I now show you the memorandum to which you referred (showing witness Complainant's Exhibit Mayo Statement)?

A. It is.

Q. 2. Did you testify from this memorandum when giving your testimony?

A. I did.

282 Complainant's counsel offers in evidence the memorandum referred to which has been heretofore marked "Complainant's Exhibit Mayo Statement" for identification, and the same is marked "In Evidence, March 22, 1898, J. A. S., ex'r."

Q. 3. If you have any corrections to make in that memorandum will you please make them now?

A. I make them now (making corrections on page 3 referring to advertisements in the Druggists' Circular on page 4, referring to the total amount).

Q. 4. I notice that the total amount of expenditure for these advertisements which you have formerly given as $2,412.35 remains unaltered by the changes which you have made in the body of the memorandum; is that correct?

A. That is correct; the changes affect only the details as to the extent of the advertising, but not the amount of money involved.

(Direct examination closed.)

Cross-examination by Mr. COE:

Cross-Q. 5. You don't mean to say, do you, that the advertising set forth in the memorandum statement marked Mayo Statement, which has been presented in evidence and with regard to which

you have testified, comprises all the advertising of Hunyadi Matyas done by the Eisner & Mendelson Company?

A. I can't say that; I am not in a position to say that.

By Mr. KNAUTH:

Redirect Q. 6. Does it comprise all that you know of?

A. That comprises all that I know of with the exception of one page of the Druggists' Circular for June, 1890, an advertisement of which this is a duplicate, and some advertisements in the Grocers' Monthly Review, which the manager told me were not paid for and which were not checked off on that account.

283 (Mr. COE: The last clause of the answer is objected to as hearsay evidence.)

Redirect Q. 7. By referring to the advertisement in the Druggists' Circular do you mean to refer to the pasteboard sheet marked Defendant's Exhibit Eisner Change of Label?

A. Yes; that is the evidence to which I mean to refer.

Redirect Q. 8. That is two pages of advertisements?

A. There are two pages of advertising, but one only of Hunyadi water.

(Signature waived.)

OSCAR KRAUSE, called as a witness on behalf of the complainant, being first duly sworn by a notary public in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. Oscar Krause; age, 38 years; residence, 349 Seventh avenue; occupation, druggist.

Q. 2. How long have you been a druggist in New York city?

A. In New York city I am in business for myself since March, 1886, and in business since 1881.

Q. 3. From 1881 to 1886, were you employed in a drug store in New York city?

A. Yes, sir.

Q. 4. Are you acquainted with the Hunyadi Janos water of the complainant, Emilie Saxlehner?

A. I am not acquainted with Mr. Saxlehner; this is the first time I have seen him.

Q. 5. I mean the water?

A. Oh, yes, I know the water very well, since I have been in the business.

Q. 6. How long have you known of the Hunyadi Janos water?

284 A. Since 1881.

Q. 7. And sold it to the public?

A. And sold it to the public.

Q. 8. And you are still selling it?

A. Still selling it, every day.

Q. 9. How is that water demanded in your drug store?

A. By customers coming in and asking for Eau de Janos.

Q. 10. Are many of your customers Frenchmen?

A. Three-fourths Frenchmen and Italians.

Q. 11. How is this water asked for by English-speaking customers?

A. They ask for Hunyadi water or Hungarian bitter water.

Q. 12. Whenever a customer comes to your store and demands a bottle of Hunyadi water, what do you give him?

A. He gets Saxlehner's Eau de Janos.

Q. 13. And that has always been your custom since you have been in business?

A. Always; I have never sold any other water but this Eau de Janos.

(Direct examination closed.)

Cross-examination by Mr. COE:

Cross-Q. 14. Did you ever know of a Hunyadi water in the market during the last ten years called Hunyadi Arpad water?

A. Yes, I know of it. They tried to sell me the Arpad water and a string of other waters, Lajos water and Matyas water. I guess he advertises in the American Druggist, Eisner & Mendelson's Hunyadi Matyas water. I saw the advertisement in the druggists' paper.

Cross-Q. 15. So that as I understand you, you have known of the Hunyadi Arpad and the Hunyadi Matyas waters, but you have only sold and dealt in Hunyadi Janos water?

A. That is all I sold. My interest at that time made it best for me to sell nothing else but this water, because I have no
285 questions to answer. People will come in now and ask of late for the Hunyadi water with the diamond label on it, and it takes us a great deal of talking now to sell water as they simply say: "That is not the water I ordered."

Cross-Q. 16. Do you mean Mr. Saxlehner's water?

A. Mr. Saxlehner's water. They say, "We want this with the red label on," and whenever you say that is not put up any more it is a great drawback.

Cross-Q. 18. You have spoken about the Hunyadi Janos water with the diamond brand on. Look at the bottle now shown you, marked Complainant's Exhibit Complainant's Former Bottle, and state whether that is the bottle you referred to.

A. This is what we always sold formerly, isn't it?

Mr. SAXLEHNER: Yes.

The WITNESS: Now these other people make a water called Apenta water with this same label on it. That is under the same color too.

Cross-Q. 19. For how many years do you recollect the Hunyadi Janos water was sold with this Diamond Brand label on?

A. As far as my memory goes, I think since I have been in busi-

ness, since 1885 or 1886, or something; I can't say positively, but I really don't remember any more having seen the Hunyadi Janos water without the diamond; but I distinctly remember there was a time when the Appollinaris people attracted our attention to it that the genuine water was only sold with it, but I cannot say the year when it was.

Cross-Q. 20. But you recollect that until recently for a number of years the Hunyadi Janos was always sold with the red diamond on, as shown on the bottle, Complainant's Exhibit Complainant's Bottle?

A. Yes.

Cross-Q. 21. And as I understand you, you further recollect advertisements or statements in papers, supposed by you to be put in by the Apollinaris Company, stating that they put the
286 Diamond Brand label on to distinguish it from other Hunyadis in the market; am I correct?

A. Yes.

(Cross-examination closed.)
(Signature waived.)

(Complainant's counsel offers in evidence duly authenticated certificate of the Budapest chamber of commerce and industry, certifying that no trade-mark has been registered for Ignatius Markus or for Alexander Reso Ensel, and the same is marked "Complainant's Exhibit Markus Ensel, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence duly authenticated copy of certificate of the first municipal district of Budapest that Alexander Reso Ensel never applied for or obtained a license for the production or sale of bitter water, and same is marked "Complainant's Exhibit Ensel, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence a duly authenticated copy of the certificate of the first municipal district of Budapest that Ignatius Markus never obtained a license for the production or sale of bitter water, and the same is marked "Complainant's Exhibit Markus, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence a duly authenticated copy of certificate of the first municipal district of Budapest that Alexander Reso Ensel never obtained a license for the pro-
287 duction or sale of bitter water, and the same is marked "Complainant's Exhibit Ensel No. 2, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence duly authenticated copy of contract of sale by Michael Ivanyi and wife to Mattoni &

Wille, and the same is marked "Complainant's Exhibit Ivanyi Contract, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence duly authenticated copy of the certificate of the first municipal district of Budapest that the original Hunyadi Matyas spring is not working and that the firm of Mattoni & Wille obtains the water named Hunyadi Matyas from the same well existing at premises No. $\frac{10,335}{a}$, and the same is marked "Complainant's Exhibit Hunyadi Matyas Spring, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of the said exhibit as immaterial and irrelevant.)

PAUL SCHERER, called as a witness on behalf of the complainant, in rebuttal, having been duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. You have been examined as a witness on behalf of the defendant in this case, haven't you, The Eisner & Mendelson Company?

A. Yes, sir.

Q. 2. Did you, on August 21, 1896, write a letter to the Æsculap Water Company, Limited, of London, of which I now show you a copy?

(Mr. COE: Objected to as immaterial and irrelevant.)

288 A. I think I wrote a similar letter; I think this is a copy of it.

Q. 3. You recognize that as the letter which you wrote?

A. Yes, sir; I wrote a similar letter to that; I think it may be an exact copy. I can't state unless I refer to my copy book.

Q. 4. Did you thereupon receive, in the latter part of September, an answer dated September 9, 1896, of which I now show you a copy?

(Mr. COE: Same objection.)

A. Yes; I think I received this letter.

Q. 5. Was the label which you sent to the Æsculap Company, when you wrote them the letter first shown to you, the red and blue label on the Æsculap bottles?

(Mr. COE: Same objections.)

A. The red and blue label; yes (referring to Complainant's Exhibit Hunyadi Æsculap Bottle).

Complainant's counsel offers in evidence the letter of August 21, 1896, written by the witness to the Æsculap Water Company, Limited, and the same is marked "Complainant's Exhibit Scherer Letter, March 22, 1898, J. A. S., ex'r."

Complainant's counsel further offers in evidence the letter of the

Æsculap Company dated September 9, 1896, in answer thereto, and the same is marked "Complainant's Exhibit Æsculap Letter, March 22, 1898, J. A. S., ex'r."

Mr. Coe: Defendant's counsel objects to the introduction of the said letters in evidence as immaterial and irrelevant to any of the issues of this case.)

Q. 6. I show you a red and white label bearing the words Mattoni's Royal Hungarian bitter water and ask you whether you know that label? The label has been marked Complainant's Exhibit Andres' Second Label for identification.

A. Yes, sir, I know that label.

Q. 7. Did you ever sell any bitter water under this red and white label?

A. Yes, sir.

289 Q. 8. In what years?

A. Between the year 1880 and I think up to 1885.

Q. 9. From whom did you procure this bitter water which you sold under this red and white label?

A. From Mattoni & Wille.

Q. 10. And sold it here in the United States of America?

A. Sold it in the United States.

Q. 11. I see that this label bears the following: "P. Scherer & Co., New York, sole agents for the United States;" who caused this one to be printed?

A. While I was agent for the water Mattoni had that put on the water.

Q. 12. Were these labels printed abroad in Budapest?

A. They were printed in Budapest; yes, sir.

Q. 13. And put upon the water and you sold the water here?

A. Yes, sir; I sold the water here.

Q. 14. And that continued from about 1880 to 1885?

A. About 1885, I think it was.

Q. 15. Did you ever import from Mattoni & Wille and sell here any Hunyadi Matyas water?

A. No, sir.

Q. 16. Did all the bitter water which you received from Mattoni & Wille during the years stated by you bear this red and white label?

A. They did not bear always that label exactly; the first water I got with this red and white label was called Ofner Kœnigs bitter water.

Q 17. But none of it bore the name Hunyadi Matyas?

A. No.

(Complainant's counsel offers the label which was heretofore marked for identification Complainant's Exhibit Andres' Second Label in evidence, and it is marked "In evidence March 22, 1898, J. A. S., ex'r.")

(Direct examination closed.)

290 (Complainant's counsel offers in evidence a duly authenticated copy of rescript of the royal Hungarian minister of

commerce addressed to the municipality of the metropolis of Budapest, dated November 20, 1892, relating to a spring called Hunyadi Matyas No. III, and the same is marked "Complainant's Exhibit Hunyadi Matyas III Rescript, March 22, 1898, J. A. S., ex'r."

Mr. COE: Defendant's counsel objects to the introduction of said exhibit as immaterial and irrelevant.

Complainant's counsel also offers in evidence a duly authenticated copy of protocol, dated July 17, 1891, and the same is marked "Complainant's Exhibit Notice of Suit, March 22, 1898, J. A. S., ex'r.".

Mr. COE: Objected to as immaterial and irrelevant.

Complainant's counsel further offers in evidence a duly authenticated copy of decree of Hungarian minister of commerce against Compagnie Generale d'eaux minerales et de bains de mer, and the same is marked "Complainant's Exhibit Hunyadi Laszlo Decree, March 22, 1898, J. A. S., ex'r."

Mr. COE: Same objection.)

Cross-examination by Mr. COE:

Cross-Q. 18. In your direct examination you state that between 1880 and 1885 some of the water which you imported from Mattoni & Wille, and sold in the United States, bore a label called Ofner Kœnigs bitter water. Look at the label I now show you marked Defendant's Exhibit Mattoni 1889 Label No. 1, and state whether or not that is the label of Kœnig bitter water referred to by you?

A. Yes, that I think is the label.

Cross-Q. 19. State whether or not such label did not on the white wings or sides have upon it the words "Hunyadi Matyas quelle"?

A. Well, I don't think that appeared on my label.

Cross-Q. 20. Are you sure of that?

291 A. I am quite sure; I know it did not appear on here. I see it appears on the sides there.

Cross-Q. 21. You are sure it did not appear on the red centre panel, but you are not sure whether it appeared on the white wings?

A. I don't know whether it appeared on the side panels, but it didn't appear on the red.

Redirect examination by Mr. KNAUTH:

Redirect Q. 22. You mean you have no recollection of seeing the name Hunyadi Matyas on those labels?

A. No, sir; I have got a copy of the old label and if I look at it I will know.

(Signature waived.)

ABRAM P. KERLEY, a witness called on behalf of the complainant in rebuttal, having been first duly sworn by a notary public by consent in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation?

A. Abram P. Kerley; age, 41; residence 367 Western Boulevard; occupation, druggist; business, 215 Boulevard, corner of Seventieth street.

Q. 2. How long have you been a druggist in New York city?

A. Between twelve and thirteen years. It will be thirteen years next fall.

Q. 3. And previous to that time where were you then?

A. The five years previous I was in Catskill, New York.

Q. 4. Also keeping a drug store there?

A. Well, as a clerk. Pardon me one moment, to go back. I have been in business for myself about ten years; I was working for other parties in New York the first two years I was in the
292 city. I was clerk in Catskill, New York, five years previous to that. Previous to that I was in Rome, New York, and the first place I worked was in Tivoli, Dutchess county, New York.

Q. 5. Was it always in drug stores?

A. Always in drug stores; yes.

Q. 6. How long have you known of the Hunyadi Janos water in this case?

A. Why, I first knew of it when I first went in business. That would be the fall of 1877, twenty-one years ago; twenty years to be positive—at least twenty years.

Q. 7. Did you sell it in the drug store at that time?

A. Yes; my first knowledge of Hunyadi water was, I think, in the winter of 1878. A minister residing in Tivoli came in and said he had seen a new mineral cathartic water advertised, called Hunyadi Janos, and he wanted to know if I would get some for him, and I told him I would. I ordered some, and that was my first knowledge of it at that time.

Q. 8. That water was known under what name?

A. He specified Hunyadi Janos or Hunyadi "Jaynos," as he called it. I remember his pronunciation very well indeed, being a peculiar name at that time, and I being new in the drug business. I sold it as much under the name Hunyadi water as under Hunyadi Janos.

Q. 9. How was it usually specified by customers in the drug stores in which you officiated?

A. Hunyadi water as a rule.

Q. 10. And whenever Hunyadi water was demanded you gave them Hunyadi Janos?

A. Hunyadi Janos.

Q. 11. Has that been invariably your custom?

A. Always has been my custom since I have been in business for myself, and, as I remember, it was the custom in the stores I worked in where I was clerk.

Q. 12. And that is your custom now?

293 A. It is my custom still. In fact, we have had trouble with people two or three different times when they have asked for one or the other of the other waters and we didn't have it in stock to prove to them that the Hunyadi Janos was the genuine water and not what they asked for. I remember clearly a party coming in and wanting a bottle of Hunyadi Arpad some few years ago and I didn't have it—it was when that brand was first put on the market. I told him that I didn't have it, that the Hunyadi Janos was the genuine and that was the kind I kept, and he took the Hunyadi Janos and was satisfied.

Q. 13. And you have followed that same practice ever since?

A. I have followed that same practice ever since up to the present time. I keep the Hunyadi Janos, and the Matyas is the only one I know of in the market at the present time. The Arpad has gone out. I order the Matyas by the quarter or half dozen.

(Direct examination closed.)

Cross examination by Mr. COE:

Cross-Q. 14. Why do you order Hunyadi Matyas water?

A. Because people demand it.

Cross-Q. 15. How do they demand it?

A. By the name Hunyadi Matyas.

Cross-Q. 16. And you sell it by that name?

A. By that name only.

Cross-Q. 17. How many Hunyadi waters have you known in the market during the last ten years?

A. Oh, possibly two or three or four; I don't exactly remember. The only ones that I can recall now are the Hunyadi Janos, the Arpad and the Matyas—well the Apenta, they don't claim Hunyadi on their label. That is the one the Apollinaris people are selling now. These are the only ones that I recall at the present time as having handled myself personally.

Cross-Q. 18. And these waters were distinguished from each

294 other by the suffixes or second names Arpad, Matyas and Janos, were they not?

A. Yes, sir.

(Cross-examination closed.)

(Signature waived.)

(Complainant's counsel further offers in evidence a duly authenticated copy of the certificate of the mayor's office of Budapest concerning the name of the Hunyadi Janos spring, and the same is marked "Complainant's Exhibit Hunyadi Spring Certificate, March 22, 1898, J. A. S., ex'r."

Complainant's counsel further offers in evidence duly authenticated copy of the certificate of the Budapest chamber of commerce and industry, dated October 19, 1887, as to the registration by Saxlehner of a trade-mark entitled Hunyadi Janos in 1873, and the same is marked "Complainant's Exhibit Hunyadi Janos Hungarian Registration, March 22, 1898, J. A. S., ex'r."

Complainant's counsel further offers in evidence duly authenticated copy of letter of Mattoni & Wille to the firm of Andreas Saxlehner of November 12, 1896, and the same is marked "Complainant's Exhibit Mattoni Letter, March 22, 1898, J. A. S., ex'r."

Mr. Coe: Objected to as immaterial and irrelevant.

Complainant's counsel also offers in evidence a duly authenticated copy of a letter from Mattoni & Wille to Saxlehner, dated January 27, 1897, and the same is marked "Complainant's Exhibit Second Mattoni Letter, March 22, 1898, J. A. S., ex'r."

Mr. Coe: Objected to as immaterial and irrelevant.)

(Adjourned to Wednesday, March 23, 1898, at 11 o'clock a. m.)

295 NEW YORK, *March* 23, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

HOBART CHEESMAN, called as a witness on behalf of complainant in rebuttal, being first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Hobart Cheesman; age, fifty-three; residence, 353 West Fifty-seventh street; occupation, physician.

Q. 2. How long have you been a practising physician in New York city?

A. Twenty years.

Q. 3. Where is your office located where you practice?

A. At that address; I have another office at 100 Broadway.

Q. 4. Are you acquainted with the Hunyadi Janos water of the complainant in this case?

A. I am.

Q. 5. How long have you known that water?

A. Twenty years.

Q. 6. Have you prescribed it to patients at times?

A. I have; frequently.

Q. 7. Has that been the case during all the time while you have been practicing as a physician?

A. It has; I began to use it while in the hospital twenty years ago.

Q. 8. Under what name or names have you known that water?

A. Probably I have known it under the name of Hunyadi Janos, but often as simply Hunyadi water; that is the proper name for it.

296 Q. 9. Has that been its colloquial or usual name during the time you have known it?

A. It has to me, and I understood so by the public generally; that has been my impression.

Q. 10. When you prescribe this water to your patients, how do you prescribe it?

A. Formerly, when it was less known than at present, I wrote a

prescription for it, but it has become so well known to the public that patients hardly expect me to write a prescription for Hunyadi water; in fact, I simply tell them to get a bottle of Hunyadi water at the drug store and they go and get it, knowing the name.

Q. 11. When you so prescribe a bottle of Hunyadi water for them you intend them to get a bottle of Hunyadi Janos water?

A. That has been my intention.

Q. 12. Do you ever send any of your patients to Quencer's drug store at No. 400 West Fifty-seventh street?

A. Yes; I often tell patients to go there or they can go there; it is a good drug store; I suppose they do; I can't state positively that they do, but I often tell my patients if they are in the neighborhood to go to certain drug stores, among them Quencer's Ihlefeld and Dugan & Merritt; those are the ones right in my neighborhood. Of course, if I am out of that neighborhood I should send my patients to a good drug store in that neighborhood which is the most convenient.

(Direct examination closed.)

Cross-examined by Mr. COE:

Cross-Q. 13. During the last ten years have you known any other Hunyadi water on the market than Hunyadi Janos water?

A. No, I have not. Possibly, I think I do recollect having received circulars of some water of that kind, but like a good many other things of that kind it goes out of my mind and I really
297 have forgotten all about it. I have always supposed, when I was ordering Hunyadi water that I was ordering Hunyadi Janos water, and I haven't thought of anything else; nothing else has been in my mind. Come to think it over, however, I think, as I said, I have received a circular once or twice—I don't know whether more than once or not—about some other Hunyadi water, but I don't know the name of it; I have forgotten what the name was even.

Cross-Q. 14. You couldn't state whether it was the Hunyadi Arpad or the Hunyadi Matyas?

A. I really could not.

Cross-Q. 15. Have you received any circulars purporting to come from the Apollinaris Company or Charles Graef & Company, their agents in the United States, stating that there were other Hunyadi waters in the market or that Hunyadi had become a generic name?

A. I don't remember that I have.

Cross-Q. 16 You won't swear that you have not, will you?

A. I will not, because frequently I received circulars from druggists and manufacturers, and threw them in my waste-paper basket without reading them, more often than not, I think.

Cross-Q. 17. Your supposition that when you told a patient to go to a drug store and get a bottle of Hunyadi water he would get Hunyadi Janos, is a mere personal supposition, is it not; you don't mean to testify as a fact that, when they went to the drug store and

asked for Hunyadi water, they would get Hunyadi Janos, do you, of your own personal knowledge?

A. I don't know whether they did or not. That was my intention; I know that; that is perfectly clear. It was my intention, and it seems to me that the druggists who wouldn't give them Hunyadi Janos wasn't carrying out my orders. I looked at it in that light. There are a great many druggists who will do that kind of thing; the doctor will order something and not be very specific about it, and they will take advantage of it and give the patient something that they know the doctor does not intend him to have.

298 Cross-Q. 18. You don't mean to say that any of the druggists in your neighborhood, if you had told the patient to get a bottle of Hunyadi Janos water, or written Hunyadi Janos on a slip of paper and told the patient to present that to the drug store, would palm off anything else as Hunyadi Janos water, do you?

A. He wouldn't dare to.

(Signature waived.)

HENRY F. ROBINSON, called as a witness on behalf of complainant, in rebuttal, being first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. State your name, age, residence and occupation?

A. Henry F. Robinson; age, 50; residence, 352 West Fifty-eighth street; occupation, physician.

Q. 2. How long have you been a practicing physician?

A. I have been connected with actual practice for fifteen years I have been connected with the study of medicine for thirty years.

Q. 3. How long have you practiced in New York city as a physician?

A. Eleven years.

Q. 4. And previous to that time where did you practice?

A. In England.

Q. 5. Do you know the complainant's bitter water called Hunyadi Janos water?

A. Very well.

Q. 6. How long have you known that water?

A. I have known it for twenty-five years.

Q. 7. Have you prescribed it to patients?

A. Very frequently.

Q. 8. How do you prescribe it to your patients?

299 A. I order Hunyadi water very often by word of mouth and very frequently by writing the word down on one of my prescription blanks.

Q. 9. And when you write the name down on your prescription blank, what do you write?

A. Some Hunyadi, Hunyadi water.

Q. 10. That has been the common appellation that you have used for that water for a number of years?

A. I have always known it as such.

Q. 11. And when you prescribe a bottle of Hunyadi water to one of your patients you meant him to get the Hunyadi Janos water?

A. I meant him to get the Hunyadi Janos water.

Q. 12. And if he would get something else at the drug store——

A. That would be a fraud and substituting something which I didn't order.

Q. 13. Do you sometimes send your patients to the drug store of William J. Quencer?

A. I don't send them to any drug store in particular.

Q. 14. Do you know the drug store of Quencer at No. 400 West Fifty-seventh street?

A. I do.

Q. 15. Is that in your neighborhood?

A. In my immediate neighborhood.

Q. 16. Do you know whether any of your patients go to that drug store to get their prescriptions filled?

A. I presume they do; I don't know of any. I have several patients living in the immediate neighborhood and I know they must go there.

(Direct examination closed.)

300 Cross-examined by Mr. COE:

Cross-Q. 17. Isn't it a very infrequent thing for you to write a prescription for Hunyadi Janos water during the last few years?

A. Well, when I order Hunyadi water I mean Hunyadi water, which is Hunyadi Janos.

Cross-Q. 18. I am not asking you about ordering; I am asking you the particular way of ordering; I ask you whether it is not an infrequent thing for you to give a written prescription for this water?

A. No, it is quite a frequent thing.

Cross-Q. 19. Do I understand you that you invariably write it Hunyadi water instead of Hunyadi Janos water?

A. I write it both ways.

Cross-Q. 20. Which do you think you write the most frequently?

A. I should think as frequently one as the other.

Cross-Q. 21. You say that you have been practicing in New York city the last eleven years; during the last eight or ten years have you ever heard of any Hunyadi waters in the market?

A. Yes.

Cross-Q. 22. Please name those that you recollect.

A. I don't remember their names.

Cross-Q. 23. I refresh your recollection by mentioning the Hunyadi Arpad, the Hunyadi Matyas, the Hunyadi Lajos and the Hunyadi Laszlo.

A. I haven't paid any attention to the bogus names.

Cross-Q. 24. Why do you call them bogus names?

A. Because I have always understood the Hunyadi water was the direct issue of one spring and it has always been my habit to use that and expect it to be used when I have ordered it.

Cross-Q. 25. That is the only reason why you use the words "bogus waters" as to these other Hunyadi waters?

301 A. I think they are imitations of the original.

Cross-Q 26. What makes you think they are imitations?

A. Because I understand they are made here in this country and are not really——

Cross-Q. 27. Who told you that?

A. That I can't say; I couldn't tell you who told me.

Cross-Q. 28. And you believe that all these Hunyadi waters are made in this country and are artificial waters and pose with these names with the intention of palming off these artificial waters as natural waters?

A. I understand that they are not anyhow the Hunyadi water of the one particular spring, the Hunyadi Janos.

Cross Q. 29. I am not asking you that; I am asking you as to the artificialty of these waters and please confine your answer to that.

A. Ask your question again.

Cross-Q. 29 repeated by the stenographer.

The WITNESS: Yes, I do.

Cross-Q. 30. And that is your best knowledge on the subject?

A. Yes.

Cross-Q. 31. If you were told that for the last ten years some ten or eleven waters, all natural products of natural springs in Hungary, near Budapest, and all called by the name Hunyadi and distinguished from each other by their suffixes or second names, were on the market and sold freely by the druggists in this country for the last ten years as well as abroad, wouldn't it alter your opinion as to this charge of fraud that you have made generally against these waters?

A. No, it would not.

(Cross-examination closed.)
(Signature waived.)

302 WILLIAM A. EWING, called as a witness on behalf of complainant in rebuttal, being first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. State your name, age, residence and occupation.

A. William A. Ewing; age, 55; residence, 134 West Fifty-eighth street; occupation, physician.

Q. 2. You have been examined as a witness in this case before, have you?

A. I have; yes, sir.

Q. 3. Do you know the drug store of William J. Quencer?

A. I do.

Q. 4. At No. 400 West Fifty-seventh street?

A. I do; I have known it for many years.

Q. 5. Do you ever send any of your patients to that drug store?

A. I am not in the habit of recommending any special drug store, but occasionally, when a patient is to go to a drug store, I recommend some one in the neighborhood, and frequently do recommend Mr. Quencer. I did yesterday even.

Q. 6. That drug store is in your neighborhood, is it not?

A. Yes, sir; quite near.

Q. 7. When you send a patient to that drug store recommending him to use a bottle of Hunyadi water, what do you intend him to get?

A. Well, when I recommend any patient to get a bottle of Hunyadi, I expect him to get a bottle of Hunyadi Janos water.

Q. 8. And that has always been your custom?

A. Always; I have known no other than that; I have recognized that as Hunyadi water.

(Direct examination closed.)

303 Cross-examined by Mr. COE:

Cross-Q. 9. During the last ten years have you known of any other Hunyadis in the market?

A. Well, I have an indistinct recollection of seeing the different labels, but I haven't had my attention specially called to any other.

Cross-Q. 10. But you have known that during the last eight or ten years there have been other waters called Hunyadi waters?

A. I don't know that I knew anything of that at all until my attendance here before the referee; I think since that time I have thought of it more and have recognized that there were other Hunyadi waters.

Cross-Q. 11. Do you recollect any of the names of these Hunyadi waters which you say you have ascertained since were on the market?

A. The only one that I can recall is Arpad, and I think that is called to my mind from the fact that I mentioned it the other day and was speaking of it, and he spoke of the Arpad water, but I don't think I have read any literature on the subject of Hunyadi waters, and the Arpad is the only water that I recall except the Hunyadi Janos.

Cross-Q. 12. Haven't you ever heard of the Hunyadi Matyas water?

A. No, I never have.

Cross-Q. 13. Have you during the last eight years received circulars or advertisements from the Apollinaris Company, Limited, stating that there were various Hunyadi waters on the market and that to distinguish the Hunyadi Janos from these other Hunyadis, they intended to put a diamond brand on the water?

A. If I have received such I don't recall it; they have probably gone into the waste basket.

Cross-Q. 14. You have no recollection of it?

304 A. I have no recollection of it; I have no time to read the bulk of such advertising literature.

Cross-Q. 15. Look at the bottle now shown you, marked "Complainant's Exhibit Complainant's Former Bottle," and state whether you haven't known Hunyadi Janos, during the last six years, sold with the diamond brand on?

A. I couldn't say, sir, at all. I have had no personal experiences with the Hunyadi water; I have never taken a dose of that or any other laxative water, except Saratoga, perhaps.

Cross-Q. 16. You have mentioned Saratoga water; aren't there various springs of Saratoga water distinguished by their names?

A. Yes, sir.

Cross-Q. 17. And when you prescribe Saratoga water, do you mean to say that you prescribe it as Saratoga, or don't you prescribe it as Congress, Hawthorne, &c.?

A. Yes, sir; I speak of it as a bottle of Congress water. I don't use the word Saratoga at all.

(Cross-examination closed.)

(Signature waived.)

(Complainant's counsel offers in evidence duly authenticated certificate of the Royal Hungarian statistical office to the effect that the name Hunyadi Janos is not a geographical designation, and does not contain a geographical designation, but is the name of the establishment of Andreas Saxlehner, and the same is marked "Complainant's Exhibit Statistical Certificate, March 23, 1898, J. A. S., ex'r."

Mr. Coe: Objected to as incompetent, irrelevant and immaterial.)

305 Charles R. Kearney, called as a witness on behalf of complainant, in rebuttal, being first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. Knauth:

Q. 1. Please state your name, age, residence and occupation?

A. Charles R. Kearney; my age is thirty-four; my occupation is real estate; my office is St. Paul building, and my residence, 1225 Madison avenue.

Q. 2. Are you acquainted with the Hunyadi Janos water of the complainant, Emilie Saxlehner?

A. Yes, sir.

Q. 3. Do you know the bottles and the labels in and under which it is sold?

A. Yes, sir.

Q. 4. Have you ever used the Hunyadi Janos water yourself?

A. Oh, yes, sir.

Q. 5. Did you ever go to the drug store at the southwest corner

of Barclay street and Broadway called the Astor House pharmacy to demand a glass of Hunyadi Janos water?

A. Yes, sir.

Q. 6. On what day was it?

A. That was on the 18th day of January.

Q. 7. What did you demand of the clerk?

(Mr. COE: Objected to as incompetent and not proper rebuttal testimony.)

A. A glass of Hunyadi Janos water.

Q. 8. Please state what the clerk did?

(Mr. COE: Same objection.)

A. I went in on the Barclay Street side of the store and went up to the soda-water counter and asked for a glass of Hunyadi Janos. The clerk took a bottle out from underneath the counter which he poured into the glass, and when he found it didn't contain enough of the water to fill the glass he went down to the end of the
306 counter and from underneath he took another bottle which he opened and filled the glass from, and I drank the water and paid the check and went out.

Q. 9. Do you know what the bottle was from which the clerk filled your glass?

(Mr. COE: Same objection.)

A. Yes.

Q. 10. Do you know what the name of the water was?

A. Yes, it was Hunyadi Matyas.

Q. 11. Was it similar to the label on the bottle Complainant's Exhibit B which I now show you?

A. Yes, sir; it was.

Q. 12. You have spoken of two bottles from which this clerk filled your glass; did both bottles bear the same label?

A. The same label.

Q. 13. Both labels of Hunyadi Matyas water?

A. Both labels of Hunyadi Matyas water.

(Direct examination closed.)

(Mr. COE: Counsel for defendants cross-examines *de bene esse* conditionally.)

Cross-examined by Mr. COE:

Cross Q. 14. You say you are familiar with the labels of the Hunyadi Janos water?

A. Yes, sir.

Cross-Q. 15. When you saw the clerk pouring out the water from the Hunyadi Matyas bottle, you saw in a moment, did you not, that you were not getting Hunyadi Janos water?

A. Yes, sir.

Cross-Q. 16. And you allowed him to go right ahead and fill your order for Hunyadi Janos water with the water from a Hunyadi Matyas bottle?

A. Yes, sir.

Cross-Q. 17. So you were not deceived at all into the belief that you were getting Hunyadi Janos water, were you?

A. No.

(Cross-examination closed.)

307 Redirect by Mr. KNAUTH:

Redirect Q. 18. Did you go to that drug store by request?

A. I did, sir.

Redirect Q. 19. For the purpose of ascertaining whether the clerk in charge of that store was in the habit of dealing out Hunyadi Matyas water for Hunyadi Janos water?

(Mr. COE: Objected to as calling for conclusion and opinion testimony.)

A. Yes, sir.

Recross by Mr. COE:

Recross-Q. 20. Are you in the habit of taking Hunyadi Janos water?

A. I have taken it frequently; I can't say I am in the habit; probably once in a month.

Recross-Q. 21. How did you find the glass of water which you say you drank at this drug store acted?

A. Well, I have not any very distinct recollection regarding that.

(Signature waived.)

RUDOLPH HERLING, called as a witness on behalf of complainant in rebuttal, being first duly sworn by a notary public by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Rudolph Herling; age, fifty-three; residence, 269 Cornelia street, Brooklyn; I am a clerk in a banking-house.

Q. 2. Do you know the Hunyadi Janos water of the complainant Emilie Saxlehner?

A. Yes; I know it very well.

Q. 3. How long have you known it?

A. Oh, since many years.

Q. 4. Have you ever used it?

A. Yes; I used it myself.

308 Q. 5. Are you acquainted with the label for that water?

A. Yes.

Q. 6. Is the bottle which is before you, Complainant's Exhibit Complainant's Bottle, a bottle of the kind you have known for this water?

A. Yes; that is a bottle of the genuine Hunyadi Janos water.

Q. 7. Did you ever go to the drug store at the corner of Barclay street and Broadway known as the Astor House pharmacy to demand a glass of Hunyadi Janos water?

(Mr. Coe: Objected to as incompetent, immaterial and irrelevant, and not proper rebuttal testimony.)

A. Yes; I once went there.

Q. 8. Do you remember the date when you went there?

(Mr. Coe: Same objection.)

A. Yes; it was on the 24th of January, this year.

Q. 9. 1898?

A. 1898.

Q. 10. At whose request did you go there?

(Mr. Coe: Same objection.)

A. At the request of Mr. Kalman Saxlehner.

Q. 11. Now please state what you said when you went into the drug store and what the clerk did?

(Mr. Coe: Same objection.)

A. Well, I said to the clerk in charge of the counter "Give me a glass of Hunyadi Janos water." That was all I said.

Q. 12. What did he do?

(Mr. Coe: Same objection.)

A. He took a bottle from behind the counter and filled the glass and gave me that glass and I drank it.

Q. 13. Did you see what the bottle was from which he filled the glass?

(Mr. Coe: Same objection.)

A. Yes; I noticed that it was not the Hunyadi Janos water; it had a different label on it and I noticed that it was Hunyadi Matyas.

309 Q. 14. Was it a bottle with a red and blue label and the Hunyadi Matyas label on it?

A. Yes; it had another label across. That man tried to cover the white label with his hand, but I could clearly see that it was a bottle of Hunyadi Matyas water that he filled my glass from.

Q. 15. Was the bottle from which he filled this glass substantially like Complainant's Exhibit B now before you?

(Mr. Coe: Same objection.)

A. Yes; it was such a bottle he filled my glass from.

Q. 16. And did the clerk cover with his hand that white label?

(Mr. Coe: Same objection.)

A. Yes, he was careful to cover it, but I could clearly see it on both sides.

Q. 17. The white label with the red seal on it?

A. Yes, sir.

Q. 18. You could see the red seal in spite of the effort?

(Mr. COE: Same objection.)

A. Yes, I could see part of the red seal and the white corners.

(Mr. COE: Counsel for defendants cross-examines *de bene esse* conditionally.)

Cross-examined by Mr. COE:

Cross-Q. 19. What did this clerk say when he waited on you in response to your request for a glass of Hunyadi Janos water?

A. "All right," he said; that was said. I asked him how much and he said ten cents and I paid ten cents for it.

Cross-Q. 20. That was the only thing he said to you?

A. That was the only conversation.

Cross-Q. 21. Are you sure that you asked for Hunyadi Janos and not Hunyadi water?

A. Oh, no; I am quite sure Hunyadi Janos water.

Cross-Q. 22. What sort of a looking man was this clerk who waited upon you; please describe him?

A. I cannot well recollect. As far as I can recollect it was a man of big stature; I think he had a light-brown mustache; that is about all I know.

310 Cross-Q. 23. What kind of hair?

A. If I see him I can identify him. I am sorry I can't say what kind of hair he had.

Cross-Q. 24. And this is the best description you can give of his personal appearance?

A. Yes, sir.

Cross-Q. 25. When you say you saw him pouring the water as you say from a Hunyadi Matyas bottle into the glass that you were to drink from, you were not deceived into believing that you were getting Hunyadi Janos water, were you?

A. Yes, I was deceived; certainly.

Cross-Q. 26. How can you say that, when you say that you knew it was a bottle of Hunyadi Matyas water?

A. I demanded a glass of Hunyadi Janos and didn't get the right stuff.

Cross-Q. 27. But you knew that you didn't get what you were asking for, didn't you?

A. I didn't know it; of course, I saw that wasn't the right stuff, but I didn't say anything.

Cross-Q. 28. But you knew that you were drinking Hunyadi Matyas water and not Hunyadi Janos water, didn't you?

A. Yes; I must confess I knew that at that time.

Cross-Q. 29. You were able to distinguish between the bottles, were you not?

A. Yes.

(Cross-examination closed.)

Redirect by Mr. KNAUTH:

Redirect Q. 30. Did you know whether or not there was contained in this bottle marked Hunyadi Matyas any genuine Hunyadi Janos water or anything else?

A. I couldn't tell you; I don't know, only that one tastes like the other.

Redirect Q. 31. You knew that he filled your glass from a bottle which had the name Hunyadi Matyas on it?

311 A. Yes.

Redirect Q. 32. What the water was you don't know?

A. No.

Redirect Q. 33. And, therefore, you can't tell whether you were deceived into getting something else or not?

A. I can't tell that.

Recross by Mr. COE:

Recross-Q. 34. The water you so drank tasted like Hunyadi Janos water, didn't it?

A. Yes, sir.

Recross-Q. 35. You were in the habit of taking Hunyadi Janos water?

A. Oh, yes.

Recross-Q. 36. And you know the effects of Hunyadi Janos water?

A. Yes, sir.

Recross-Q. 37. And the effects of the glass of Hunyadi water you so drank on this day were the same, were they not?

A. No effect at all.

Recross-Q. 38. You say you are in the habit of taking Hunyadi Janos water, have you ever taken any and had no effect?

A. Yes; always had a decided effect.

Recross-Q. 39. Did you take more or less of the Hunyadi Janos than you took this time?

A. No; I never took more than one glass at a time.

Recross-Q. 40. As I understand you, you are unable to give a better description of the man that waited on you than you have done in your testimony?

A. I am sorry, but I can't give a better description.

(Signature waived.)

312 JOSE A. MACHADO, called as a witness on behalf of the complainant, in rebuttal, being first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Jose A. Machado; age, thirty-six; residence, Plainfield, New Jersey; occupation, dealer in electrical machinery.

Q. 2. Please state what your firm is and where your firm is situated in New York city.

A. Machado & Roller, 203 Broadway, New York.

Q. 3. Did you ever, at my request, go to the pharmacy at the corner of Barclay street and Broadway, known as the Astor House pharmacy, to demand a glass of Hunyadi Janos water?

(Mr. COE: Objected to as incompetent, irrelevant and immaterial and not proper rebuttal testimony.)

A. Yes, sir.

Q. 4. Do you remember when it was?

(Mr. COE: Same objection.)

A. It was on the 24th day of January of this year.

Q. 5. Please state what you said and what was done.

(Mr. COE: Same objection.)

A. I asked the clerk at the soda-water fountain for a glass of Hunyadi Janos water and asked him if he kept it. He said he did, and took from behind the counter from which he poured out and served me a glass of mineral water which tasted somewhat similar to or practically like the Hunyadi Janos; but I noticed that the bottle from which he took it was not the regular bottle of the Hunyadi Janos water, and that it had on it a white label with a red stamp or brand on it which is not on the regular bottles of the Hunyadi Janos water.

Q. 6. Do you remember what name was printed on the bottle from which the clerk poured out the glass?

A. Well, do you mean on the label itself?

313 Q. 7. On the label; yes.

A. I didn't see the printing on the label; I saw the seal.

Q. 8. The red seal?

A. The red seal.

Q. 9. Was that red seal substantially like the red seal on the Complainant's Exhibit B which is now before you?

A. Yes, I should call it the same.

Q. 10. How long have you been acquainted with the bottle and label of the Hunyadi Janos water?

A. Oh, for some four or five years.

Q. 11. Have you known it in the label as it appears in Complainant's Exhibit Complainant's Bottle?

A. Yes.

Q. 12. Substantially like that?

A. Yes.

Q. 13. Are you sure that what was handed to you was not poured out of a bottle like this one last shown to you?

(Mr. COE: Same objection.)

A. I am.

(Direct examination closed.)

Mr. COE: Counsel for defendants cross-examines *de bene esse* conditionally.

Cross-examined by Mr. COE:

Cross-Q. 14. You have stated that the water you drank at this drug store tasted like Hunyadi Janos water. Are you in the habit of drinking Hunyadi Janos water?

A. I use it from time to time; I have for the last ten years.

Cross-Q. 15. And you don't know whether the water that you were drinking was not Hunyadi Janos water?

A. It was a salty water of the same character as the Hunyadi Janos water.

Cross-Q. 16. And you really can't tell whether it was Hunyadi water or not?

A. I can't swear to it.

314 Cross-Q. 17. What sort of a looking man was the clerk that served you?

A. A man of medium size with a mustache; I didn't notice the clerk particularly.

Cross-Q. 18. What sort of hair had he?

A. I couldn't tell you.

Cross-Q. 19. And you recollect nothing of his personal appearance except the vague description you have given?

A. That is all.

Cross-Q. 20. The only way that you judged that you were not getting Hunyadi Janos water was from the appearance of the bottle, was it not?

A. Yes. I can swear that the bottle that he served me from, which was a partly empty bottle, was not a bottle with that label on it (indicating complainant's bottle).

Cross-Q. 21. And you were readily able to distinguish the label of the bottle from which you were served from the Hunyadi Janos label, were you not?

A. Yes, sir.

Cross-Q. 22. When you drank the water you believed that you were not drinking Hunyadi Janos water but Hunyadi Matyas water; isn't that so?

A. I didn't believe anything about it; I asked for Hunyadi Janos water and he served me something out of a bottle like that (Complainant's Exhibit B).

Cross-Q. 23. Then you could readily distinguish that you were being served from the bottles which you had known as Hunyadi Janos; isn't that correct?

A. Yes.

Redirect by Mr. KNAUTH:

Redirect Q. 24. Had the differences between the labels on the complainant's bottles and the bottles of the Hunyadi Matyas water been previously called to your attention by me?

(Mr. COE: Same objection.)

315 A. Yes.

Redirect Q. 25. Did I not tell you that I desired to ascertain

whether it was a habitual practice at the drug store to serve out this Hunyadi Matyas water instead of Hunyadi Janos or whether the serving out of such water which had been previously reported to me was an accident?

A. Yes, sir.

Redirect Q. 26. And you went there to test this fact?

A. Yes, sir.

(Signature waived.)

Adjourned to Friday, March 25, 1898, at 11 a. m.

NEW YORK, *March* 25, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

KALMAN SAXLEHNER, called as a witness on behalf of complainant, in rebuttal, having been already sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Have you heretofore testified in this case?

A. Yes, sir; I have.

Q. 2. It has been shown on the part of the defendants that, previous to the year 1890, Mattoni & Wille sold in Hungary various kinds of bitter waters under various names, among them the name Hunyadi Matyas, and that the firm of Ignatz Ungar & Son sold various kinds of bitter waters, among them one called Hunyadi Arpad. Do you know whether or not your father, Andreas Saxlehner, ever took any steps to enjoin these parties from the use of their names and labels?

A. Yes, he did; several times. The first time my father protested against the use of Hunyadi Matyas was in 1873.

Q. 3. Do you mean the use of Hunyadi Matyas or the term?

316 A. No, simply the name of Hunyadi Matyas, because Markus applied for the use of the name Hunyadi Matyas for a certain bitter water and against this Andreas Saxlehner protested to the magistrate of the city of Ofen, but in consequence of the non-existence of trade-mark law at that time the protest of Andreas Saxlehner was rejected.

(Mr. COE: The answer is objected to as evidently hearsay evidence and not founded on the personal knowledge of the witness.)

Q. 4. Did your father make other protests at other times against parties using the name Hunyadi for bitter waters in Hungary?

(Mr. COE: Same objection.)

A. Yes, several times, and once he tried a suit against another man who used Hunyadi for bitter water; that was in 1887.

Q. 5. Do you know what the name was?

A. Hunyadi Joseph. Then, as I heard from our lawyer, my father was told it was no use to make any efforts at that time because there was no law which would give protection to him. This condition existed until 1890, when a statute was passed which gave

protection to trade marks, but only to pictorial trade-marks, so that no name alone could be registered.

(Mr. COE: Answer objected to as not only impliedly but confessedly hearsay and as founded only on the personal opinion of the witness.)

Q. 6. Did you mean to say that your father was advised by his legal adviser previous to 1890, that there was no protection under the existing trade-mark laws or the existing laws of Hungary relating to trade-marks against infringers of his name and label?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. Well, as I heard it from our lawyer later, before 1890, there was a statute which gave protection against so-called counterfeit or imitation labels and against literal imitations, but not imitations which were similar merely.

317 (Mr. COE: Answer objected to as immaterial and irrelevant, and as hearsay evidence.)

Q. 7. Did any one of the parties in Hungary who adopted names involving Hunyadi for bitter waters previous to 1890, ever adopt the full name Hunyadi Janos and a label identical with the label used by your father for his Hunyadi Janos water?

(Mr. COE: Objected to as calling for hearsay evidence.)

A. No.

Q. 8. You have never heard of any suit being brought by your father against any party who had directly counterfeited his name of Hunyadi Janos and his label used for his bitter water?

(Mr. COE: Same objection.)

A. No.

Q. 9. Then, as I understand you, all the various parties against whom your father proceeded from time to time, used other names of which Hunyadi formed only a part, and labels which were more or less similar to your father's label in color and design; is that right?

(Mr. COE: Same objection and as leading.)

A. Yes, sir.

Q. 10. Did your father die in the year 1889?

A. Yes, sir.

Q. 11. There are two decrees of the Hungarian minister of commerce offered in evidence in litigations commenced by your mother against the firm of Mattoni & Wille for the purpose of procuring cancellation of certain Matyas labels by that firm, one of the year 1894, and another of the year 1896. Can you explain what was the necessity of bringing the second litigation after the first one had terminated in a decree in favor of your mother and cancelling the labels of Mattoni & Wille?

(Mr. COE: Objected to as immaterial and irrelevant, and as not the best evidence.)

A. The law of 1890 gave protection only to pictorial trade-marks, as I stated it before, and word trade-marks could not receive
318 protection; therefore, when my mother, in 1891, brought this lawsuit against Mattoni & Wille, which ended in 1894 with the decree of the minister of commerce changing the form of the Mattoni label, but leaving the Hunyadi name, this statute was altered or amended in 1895 and this new trade-mark law gave protection to word trade-marks, and Mattoni & Wille registered at once the Hunyadi Matyas name as a word trade-mark, and upon this Mrs. Saxlehner commenced a lawsuit against Mattoni & Wille, which was won in 1896, I think, August, by prohibiting to the firm of Mattoni & Wille the use of the Hunyadi name, either alone or in connection with any other words.

(Mr. COE: Objected to as *as* immaterial, irrelevant and hearsay evidence.)

Q. 12. The defendants have presented some alleged translations of extracts from letters between the Apollinaris Company, Limited, and the firm of Andreas Saxlehner. Have you ever seen the originals of those letters?

A. No; in fact, I first heard of those letters the other day, when Mr. Coe read the contents.

Q. 13. Hasn't your firm had a litigation with the Apollinaris Company?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. Well, the firm of Andreas Saxlehner, or Mr. Andreas Saxlehner, and later Mrs. Saxlehner, for twenty years have had litigations with the Apollinaris Company.

(Mr. COE: Objected to as immaterial and irrelevant and hearsay evidence.)

Q. 14. How did these litigations result, if you know?

(Mr. COE: Same objection.)

A. In 1876, as I stated before, there was a contract made between Andreas Saxlehner and the Apollinaris Company. This contract could not be determined by Andreas Saxlehner, but only by the Apollinaris Company.

319 Q. 15. You mean the contract which has been offered in evidence?

A. Yes, sir. Soon after the beginning of the contract Mr. Steinkopf, one of the two principal owners of the Apollinaris Company, visited Mr. Andreas Saxlehner and asked him to be allowed to take up the sale of the Friederichshall water, saying to Mr. Saxlehner that the Friederichshall water, being very much sold in the market, it would be better in the Apollinaris Company's hands, as they would push down the sale of the Friederichshall, and push instead of that the Hunyadi Janos, and then my father gave his permission.

A short time afterwards, a year or two later, Mr. Andreas Saxlehner saw that Mr. Steinkopf did not keep his promise, because he pushed the Friederichshall water to the damage of Hunyadi Janos. Thereupon my father tried to withdraw his permission, and out of that came a lawsuit. This lawsuit was pending for ten years, and I think it is about to be settled now in London.

(Mr. Coe: Answer objected to as hearsay evidence and as immaterial and irrelevant.)

Q. 16. Have you any personal acquaintance with this lawsuit which you say was pending in London?

A. I spoke about these matters with our London lawyers and Budapest lawyers in 1897, and then in the spring of 1897 I was in London at the lawsuit which we had against the Apollinaris Company on account of their using the Hunyadi name, and in this lawsuit I heard in open court all the witnesses of the Apollinaris Company and the lawyers of both sides.

(Mr. Coe: Objected to as immaterial and irrelevant and as confessedly hearsay evidence.)

Q. 17. You are now talking of another lawsuit which your firm had with the Apollinaris Company, Limited, are you not?

(Mr. Coe: Objected to as immaterial and irrelevant.)

A. Yes.

Q. 18. Are you personally familiar with that lawsuit?

(Mr. Coe: Same objection.)

320 A. Yes, sir.

Q. 19. What was the object of that lawsuit?

(Mr. Coe: Same objection.)

A. The cause of this lawsuit was because the Apollinaris Company, or one of the owners, Mr. Steinkopf, of the Apollinaris Company, bought, in the year 1887, a bitter-water spring in Hungary, which was called the Ofen Rakoczy spring. After several years, maybe four or five years, the Apollinaris Company put a Red Diamond label on the Hunyadi Janos water, and in England they tried to make the Red Diamond name known, instead of Hunyadi Janos. Later they ended the contract, in March, 1896, and then they brought the water of that Ofen Rakoczy spring under the name of Apenta of the Uj Hunyadi springs upon the market, and put upon their product so sold under the Hunyadi name the same Red Diamond mark. In 1896, when Mrs. Saxlehner received the decision in Hungary, by which the Hunyadi name was acknowledged as her property and a good trade-mark, she sued the Apollinaris Company in London for using the Uj Hunyadi name, and won this lawsuit with the damages and costs.

Q. 20. And an injunction?

(Mr. Coe: Same objection.)

A. Yes, sir.

Q. 21. Is the paper which I show you a duly authenticated copy of the judgment in that suit?

A. Yes, sir.

(Complainant's counsel offers in evidence the paper referred to by the witness, and the same is marked Complainant's Exhibit Apollinaris Injunction, March 25, 1898, J. A. S., ex'r.

Mr. COE: Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal testimony).

Q. 22. Were you present at the trial of this action between your mother and the Apollinaris Company, Limited?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. Yes, sir.

321 Q. 23. It was tried in open court?

(Mr. COE: Same objection.)

A. Yes, sir.

Q. 24. Do you know what the Apollinaris Company or Mr. Steinkopf did with the waters of this Ofen Rakoczy spring which you say he had bought in 1886, up to the year 1896, when this water was brought on the market under the name Apenta from the Uj Hunyadi springs?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. Well, as it was proved in that lawsuit, Mr. Steinkopf had the intention to bring that Rakoczy water after a number of years as Hunyadi water in the market, but in the meantime he wanted to make the Hunyadi Janos water known as the Red Diamond brand Hunyadi water, and after so many years ending the contract they tried to put their own Hunyadi water as Hunyadi Red Diamond label, and knock out Hunyadi Janos in that way. This fact has been admitted by the director, Mr. Charles Prince.

(Mr. COE: Objected to as immaterial, irrelevant and heresay evidence.)

The WITNESS: A letter was produced wherein the Apollinaris Company laid open these plans in the year 1888. This letter was written to Wedekind, Fehr & Company. This letter was produced in open court and read to Mr. Charles Prince, a director of the Apollinaris Company, and he was asked whether he acknowledged the letter as written by the Apollinaris Company, and he acknowledged the letter.

(Mr. COE: Objected to as immaterial, irrelevant and hearsay.)

Q. 25. Is this Mr. Prince to whom you have referred the same person whose affidavit the defendants have offered in evidence in this case?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. Yes, sir.

Q. 26. Was he one of the managers of the Apollinaris Company at the time?

(Mr. COE: Objected to as immaterial and irrelevant.)

322 A. A director.

Q. 27. Is the letter or portion of the letter which you say was read to Mr. Prince at the trial and admitted by him to have been written by his company the letter which I now show you (showing witness letter)?

A. Yes, sir.

(Mr. KNAUTH: Complainant's counsel for the sake of convenience, reads the letter shown to the witness in evidence as follows:

"That you enter into agreements on our behalf with all the principal buyers in your district under which they bind themselves not to purchase or import any Hungarian bitter water from any but ourselves and to resell at prices fixed by us while we engage to give them the water at the prices which will be raised or lowered from time to time as the state of the market may require, but which will always give them a margin of profit of so much per cent. on the prices. With such an arrangement we should be in a position to command the market. If any competing waters entered in, they would in the first place be unable to find any buyers of position. If, nevertheless they were offered for sale to the public, we would then instruct the trade to drop the prices to such an extent that the competing waters would be unsalable. As to the trade it would be a matter of indifference to them whether the water was called Hunyadi Janos or some other name, so long as it bore the diamond mark and the public could be educated by means of systematic advertising to look to the diamond mark for security. This plan has the advantage that it can be adopted immediately, and is equally applicable and useful whether we continue to sell Saxlehner's Hunyadi Janos or we conclude to drop it and sell our own water."

Mr. COE: Objected to as incompetent, immaterial and irrelevant.)

Q. 28. Do you know whether or not in connection with this scheme the Apollinaris Company, Limited, or Mr. Steinkopf
323 registered a firm or corporation in Budapest for the exploitation of this water?

(Mr. COE: Same objection.)

A. Yes; that is the very first time they registered the Uj Hunyadi, and then they made and registered a firm name "Uj Hunyadi Stock Company," and in all different languages they registered this name Uj Hunyadi Stock Company in Budapest, but we commenced a lawsuit and in the courts it has been proven that the registration of this firm Uj Hunyadi Stock Company was simply intended to make use of the Hunyadi name upon their water and they have been compelled to drop the Uj Hunyadi name and they have been even wiped out of the firm registry of the city of Budapest and now they conduct business under the name Apenta Stock Company.

Q. 29. What is the meaning of the name Uj Hunyadi?

(Mr. COE: Same objection.)

A. New Hunyadi.

Q. 30. Then you mean to say that the Apenta water which the Apollinaris Company is now selling in this country and which has been mentioned several times in defendant's proofs was first introduced on the markets of this country about the year 1896 under the name of Apenta Uj Hunyadi?

A. Yes, sir.

Q. 31. And the red diamond of the Apollinaris Company was placed on that water?

A. Yes, sir.

Q. 32. Is that name Uj Hunyadi still used by the Apollinaris Company on this Apenta water in this country?

(Mr. COE: Same objection.)

A. No.

Q. 33. When was the use of that name Uj Hunyadi discontinued by the company and under what circumstances?

(Mr. COE: Same objection.)

A. The complainant made a motion here in 1897, I think it was in the month of May, against the American agents of the
324 Apollinaris Company, Charles Graef & Company, and a short time before the motion came into court the Apollinaris Company or Charles Graef & Company withdrew the name Uj Hunyadi from the labels.

Q. 34. And changed the labels?

A. Well, I couldn't say they changed the form of the label, but they took off the Hunyadi name from their labels.

Q. 35. And exchanged them for new labels?

A. Yes, sir; that is it; they even scratched the Hunyadi name from their capsules.

(Mr. COE: I make the same objection to all these questions.)

Q. 36. As I understand you, the Apollinaris Company, Limited, then no more used the name Hunyadi on bitter water in this country?

(Mr. COE: Same objection.)

A. No, and nowhere.

Q. 37. Do you know what name this former Uj Hunyadi Stock Company has now adopted as a firm name in Budapest?

(Same objection.)

A. Apenta Stock Company.

Q. 38. Were these two litigations, the Friederichshall action and the action about the Uj Hunyadi name, the only litigations which your firm had with the Apollinaris Company, Limited, during the time of the contract?

(Mr. COE: Objected to as immaterial and irrelevant.)

A. No; there were many other litigations. One was in the beginning of the eighties; I don't know the exact year now. The Apollinaris Company refused to take the water because it claimed that it wasn't a good quality, and there grew up a big lawsuit out of this dispute which went through the three instances of the Hungarian court. It went up to the highest court of appellation, and in all three instances the Apollinaris Company lost it. Then, in or about 1880, or before, the Apollinaris Company registered without the knowledge of my father, Mr. Andreas Saxlehner, the
325 Hunyadi trade-mark in London in the way that it appeared by the registration that the Apollinaris Company was the proprietor of the Hunyadi trade-mark. This came to my father's knowledge some years later, I think in 1883, whereupon my father at once commenced a litigation against the company. This took several years more, and it was ended through another litigation between the Apollinaris Company and the Vichy Company, by which then it was proven that the Hunyadi Janos trade-mark is Saxlehner's property, and the Apollinaris Company losing the lawsuit lost the trade-mark too, naturally, which applied to Mr. Saxlehner. This was proven and shown in the other litigation in 1896.

Q. 39. You mean that this trade-mark for Hunyadi Janos which had been registered by the Apollinaris Company, Limited, in England, in its own name, instead of that of Mr. Saxlehner, was finally cancelled at the suit of the Vichy Company?

(Mr. Coe: Same objection.)

A. Yes; and given to Mr. Andreas Saxlehner.

Q. 40. Have you now stated all the litigations which took place between the Apollinaris Company, Limited, and your father and your firm?

(Same objection.)

A. Well, there has been another litigation which was thrown together with the Friederichshall. This was a litigation in which the Apollinaris Company said that Andreas Saxlehner imports or exports the Hunyadi water in competition with the Apollinaris Company in those countries and territories which were under the jurisdiction of the Apollinaris Company. This was going on for about six or seven years, too, but again it was proven that Mr. Saxlehner not only did not export to those countries, but wherever he had the least suspicions that the water could be exported he refused orders.

Q. 41. Wasn't that charge frequently made by the Apollinaris Company that your father connived with those people who were selling Hunyadi water in the jurisdiction of the Apollinaris Company and secretly furnished the water to them?

(Mr. Coe: Same objection.)

326 A. Yes, sir; the Apollinaris Company very often charged this against us. Even in the lawsuit in London, in 1896 which we had against the Apollinaris Company there were witnesses, importers who imported the Hunyadi Janos water, and it

the witness box they testified that it would have been simply impossible for Mr. Saxlehner to know how they imported the water, because they bought the water through six or seven hands.

(Mr. COE: The answer is objected to not only as incompetent, immaterial and irrelevant, but as confessedly hearsay.

Counsel for complainant in this connection calls the attention of the court to the reported decision in the suit of Apollinaris Company, Limited, against Scherer, reported in volume 27, Federal Reporter, page 18, in which the court, on page 21, state as follows:

"Although the defendant was duly aware, when he bought the water which he has imported from those to whom Saxlehner had sold it, of the terms of the agreement between Saxlehner and the complainant, that circumstance does not help the complainant's case, for there was no breach of covenant on the part of Saxlehner; on the contrary, he did all that was in his power to carry out the agreement between himself and the complainant.")

Q. 42. Do you know whether or not, within the years of your experience, your father or your mother ever exported any Hunyadi Janos water to the territories which had been conceded to the Apollinaris Company, Limited, to other persons than the agents or the representatives of the Apollinaris Company?

(Same objection.)

A. I know positively that my father or my mother never did export in the territories of the Apollinaris Company.

Q. 43. What were the relations between the Apollinaris Company, Limited, and your father, and after his death your mother?

(Same objection.)

A. They were continuously at war and had a hostile feeling.

Q. 44. There has been offered in evidence a notice from
327 your firm directed to the firm of Mattoni & Wille in the year 1891, demanding the discontinuance of the use of certain Hunyadi Matyas labels, and also a decree rendered in the year 1894 cancelling these labels. Can you state when the suit was commenced by your mother against the firm of Mattoni & Wille to carry out the demand?

(Mr. COE: Objected to as irrelevant, incompetent and immaterial.)

A. Yes; after the notice was sent in 1891, our lawyer at once commenced to collect the material and this lawsuit was filed. It was a tremendous work; the bill of complaint, I think, alone was three hundred and some pages and about four or five hundred exhibits.

Q. 45. Was this lawsuit directed alone against Mattoni & Wille?

(Same objection.)

A. No, against all of the people and owners of other mineral-water springs who used the name Hunyadi. Now when the law-

suit was filed, after some time it was rejected for a technical mistake. Our lawyer took all the suits against eight or ten people or more than that together and the minister asked that every one should be sued separately, and this gave our lawyer a great deal of work which took about a year or so till he separated them and filed each lawsuit or complaint separately 1893.

Q. 46. Have you here a printed copy of the complaint which your lawyer prepared against the several parties using imitating labels in Hungary in the year 1891, as stated by you?

(Same objection.)

A. Yes, sir.

(Complainant's counsel offers in evidence the book produced by the witness and the same is marked Complainant's Exhibit Complaint against Imitators, March 25, 1898, J. A. S., ex'r.)

(Same objection.)

Q. 47. Am I right in understanding that this complaint in
328 book form marked Complainant's Exhibit Complaint against Imitators is the collective complaint against the various infringers upon your labels which was prepared in the year 1891?

(Same objection.)

A. Yes, it is; this had to be separated then and all the exhibits and everything and a new one filed.

Q. 48. Can you state how much money and time were expended by your firm and your lawyers in Budapest upon the preparation of this complaint and those which were thereafter separated from it?

A. I couldn't say the exact sum; some thousands of florins and even dollars. Our lawyer had to spend for about two years exclusively his whole time for this lawsuit.

Q. 49. I now call your attention to Complainant's Exhibit Hunyadi Matyas Decision of 1894, which I find is dated March 31, 1894, and ask you whether that decision was the outcome of the suit against Mattoni & Wille which had been separated from this general complaint to which you have referred?

(Same objection.)

A. Yes, sir.

Q. 50. There has also been offered in evidence a certified copy of the decree obtained against the parties selling the Hunyadi Laszlo water in Hungary. Was that also the outcome of this litigation which had been separated into numerous separate litigations?

(Same objection.)

A. Yes, sir.

Q. 51. And the same with reference to the decree against the Hunyadi Lajos water

(Same objection.)

A. Yes, sir.

Q. 52. Now you say that in 1895 Mattoni & Wille registered the name Hunyadi Matyas as a trade-mark under the law of 1895, and that you commenced another suit in the year 1895 against
329 the same firm to cancel this trade-mark of Hunyadi Matyas. Is Complainant's Exhibit Hunyadi Matyas Decision of 1896 the decision which was rendered upon such litigation?

(Same objection.)

A. Yes, sir; that new law was passed, I think, in the month of August, 1895, and upon that our lawyers at once went to work and drew the complaint. The lawsuit was filed in the very early spring of 1896, and in the fall of 1896 we received these decisions which have been offered in evidence.

Q. 53. Did your firm at or about the same time also bring other complaints against other parties, who about the same time registered in Hungary other trade-marks for bitter waters employing the name Hunyadi therein?

(Same objection.)

A. Yes, our firm brought a suit against every man who used the name of Hunyadi in one or the other form, and the decisions of the minister of commerce were all in our favor.

Q. 54. Have you a statement of these decisions which have been thus rendered in favor of the complainant against users of the word Hunyadi on trade-marks for bitter waters in the years 1894 and 1896, as testified to by you?

(Same objection.)

A. Yes, I have a circular which we issued in November, 1896, giving a synopsis of the list of these decisions. I wish to remark that this went out from the main office at Budapest.

(Complainant's counsel offers in evidence the circular produced by the witness, and the same is marked Complainant's Exhibit Circular of Decisions March 25, 1898, J. A. S., ex'r.
Same objection.)

Q. 55. You have stated that your firm's lawyer at Budapest was for two years exclusively engaged in collecting and presenting the material for these litigations. Was that up to the year 1894?

A. Yes, but he was at it all the time before that and even after that between the years 1894 and 1896. He died in April, 1896, just after the filing of the lawsuit.

330 Q. 56. You mean he was contin-ously busy about this lawsuit until his death?

A. Yes, sir.

Q. 57. When you came to this country in 1895, and thereafter, did you do anything about asserting the rights of your firm or of the complainant in this country with reference to the name Hunyadi and the label used upon your bitter water?

(Same objection.)

A. Yes, sir; I sent out travelers to get information about the condition of the market and I informed myself of the situation.

Q. 58. Did you collect any affidavits?

A. Oh, yes; maybe over a hundred affidavits I collected.

Q. 59. Did you commence any suits against persons using the name Hunyadi upon labels in this country?

A. Yes, several suits against druggists and people who sold these waters.

Q. 60. Do you remember against whom you commenced such suits?

(Same objection.)

A. I think one was Flaks and Gordon, another against Treutler, another against Roediger, and others.

Q. 61. Did you also commence a suit for injunction against James Pollitz, the importer of the Hunyadi Vilmos and Hunyadi Alajos water?

(Same objection.)

A. Yes, sir.

Q. 62. What became of that suit?

(Same objection.)

A. That case was decided in our favor; in fact Pollitz consented to the injunction because he admitted his guilt.

Q. 63. Have you also commenced a suit against Alexander Neilson, the importer of the Hunyadi Lajos water?

(Same objection.)

A. Yes, and that suit is pending now in Brooklyn, eastern district.

331 Q. 61. Have you also brought a suit against Charles Graef & Company, the agents of the Apollinaris Company?

(Same objection.)

A. Yes, sir; and that suit is pending too.

Q. 65. Since these several decisions were rendered in favor of the complainant in Hungary in the year 1896, has complainant taken any steps to enforce the terms of these decisions in Hungary?

(Same objection.)

A. Yes, we made applications for seizures and over a dozen parties had to give up all the waters not being Hunyadi Janos and containing the word Hunyadi or containing a label similar to Hunyadi Janos.

Q. 66. Have there also been penal prosecutions brought by you in Hungary?

(Same objection.)

A. Yes.

Q. 67. Do you know whether or not Mattoni & Wille continued

to use the name Hunyadi Matyas after this decision of 1896 against them?

(Same objection.)

A. After 1896, no.

Q. 68. You mean they did not?

(Same objection.)

A. No, they had to stop it.

Q. 69. And they stopped it?

(Same objection.)

A. Yes, they tried to register it in Germany, I think.

Q. 70. Can you state whether the complainant made any other efforts to protect her exclusive claim to the name Hunyadi besides those already described by you?

(Same objection.)

A. Yes, sir; we protested, for instance in Germany, because they tried to register the Hunyadi name.

Q. 71. Who tried to register it?

(Same objection.)

332 A. Mattoni & Wille, and upon our protest it was refused by the German patent office.

Q. 72. Have you the decrees of the German patent office in your possession refusing such registration on behalf of Mattoni & Wille, upon the protest and interference of the firm of Andreas Saxlehner?

(Same objection.)

A. Yes, I have.

Q. 73. In what colors were the labels which imitated your Hunyadi Janos label in Hungary, and which were enjoined or canceled by the various decrees in Hungary?

(Same objection.)

A. The red and white label like our European label, and in one case, I think, there was a Hunyadi Lajos blue label which I later found here when I came to this country.

Q. 74. Now please state where the Hunyadi Vilmos and Hunyadi Alajos waters come from, which you have mentioned?

(Same objection.)

A. The Hunyadi Vilmos and Alajos come from Szegedin. That is in the southern part of Hungary, a few hundred miles from Budapest.

Q. 75. Where does the water come from which has been called Hunyadi Lajos?

(Same objection.)

A. That comes from Kocs in the county of Komorn.

Q. 76. How far is that from Budapest?

(Same objection.)

A. About sixty or eighty miles from Budapest.

Q. 77. Has there ever been any bitter water sold in Hungary called Hunyadi Kalman?

A. No, I never heard of it.

Q. 78. Was there ever a label registered for it so far as you know?

A. No.

333 Q. 79. Have you examined the affidavits of Fr. Jac. Andres, Heinrich Mattoni, Otto Maas, Gustave Kahn and Moritz Plossl, of which I show you certified copies all entitled in the suit of The Apollinaris Company, Limited, plaintiff, against Fr. Jac. Andres, defendant, in the New York supreme court in the year 1887?

A. Yes, I have, and I have read them.

Q. 80. What do you know about the facts which are stated or testified to in these affidavits?

A. They contain a lot of statements which do not correspond to the facts.

Q. 81. Can you point out in what manner these affidavits do not state the facts correctly?

A. Some points there. For instance, Mr. Mattoni puts the existence of the so-called Hunyadi Matyas spring back to 1871, whereas it is proven that the spring or that well was dug in 1873. They speak about the spring Hunyadi Kalman which I am sure never existed. Mr. Maas puts the existence of the Hunyadi Matyas well back to 1870.

Q. 82. Did you also find other inaccuracies in these affidavits?

A. Well, I can't remember now exactly, but very often the style of the affidavit is such that it misled me.

(Mr. KNAUTH: Complainant's counsel, for the purpose of showing the complete history of the litigation between the Apollinaris Company, Limited, and Fr. Jac. Andres, offered in evidence by the defendant's counsel, offers in evidence the affidavits referred to in the question to the witness concerning these affidavits, and the same are marked "Complainant's Exhibit Andres Affidavits, March 25, 1898, J. A. S., ex'r."

Defendant's counsel states on the record that as counsel for complainant has offered in evidence said affidavits, he offers in evidence a certified copy of the complete order of the denial of the motion to vacate the injunction dated January 31, 1888, by Justice Potter,

334 a memorandum of which appears on the back of the affidavits so offered in evidence by complainant's counsel, and the same is marked "Defendant's Exhibit Potter Order, March 25, 1898, J. A. S., ex'r.")

(Direct examination closed.)

Cross-examined by Mr. COE:

Cross-Q. 83. You have stated with reference to the situation of the Vilmos, Alajos and Lajos springs. Where were the Hunyadi Arpad and Hunyadi Bela springs situated?

A. They were near Budapest.

Cross-Q. 84. And the Hunyadi Matyas spring?

A. They were near Budapest too, but they were not in the same valley or same place with the Hunyadi Janos springs.

Cross-Q. 85. How far are they from the Hunyadi Janos springs?

A. The Hunyadi Matyas I can't tell you exactly how far, but it takes about an hour to walk.

Cross-Q. 86. Can't you give the distance any closer than that?

A. I don't know; I have walked that distance three or four times in my life and it took me about an hour.

Cross-Q. 87. It is about two miles, is it not—two English miles?

A. No; it must be more.

Cross-Q. 88. Is it over three miles?

A. It must be six miles.

Cross-Q. 89. Can you walk six English miles an hour?

A. I never have taken part in a race.

Cross-Q. 90. At any rate, it is in the vicinity of Budapest and near the Hunyadi Janos springs, is it not?

A. It is inside the city limits of Budapest, but I wish to remark that between the Hunyadi Janos spring and Hunyadi Matyas spring, there are mountains and hills; they are in two different valleys.

Cross-Q. 91. By the word mountains you mean hills, do you not?

335 A. They are called mountains in the sense of the geographical terms.

Cross Q. 92. How high are they?

A. The lowest of them must be 150 yards or 200 yards high from the level of the valley.

By Mr. KNAUTH:

Cross-Q. 93. That would be about 600 feet?

A. Yes.

By Mr. COE:

Cross-Q. 94. But in order to pass from the Hunyadi Janos to the Hunyadi Matyas springs, you don't have to cross these hills, do you?

A. Yes, sir.

Cross-Q. 95. You go through the valleys, don't you?

A. You have to go over these mountains.

Cross-Q. 96. Are you sure of that?

A. I am quite sure of that, because the Hunyadi Janos valley is surrounded like a ring by mountains, and some of them are very high, especially on the western part.

Cross-Q. 97. But the Hunyadi Bela, the Hunyadi Arpad and the Hunyadi Matyas are all in the city limits of Budapest, are they not?

A. They are in the city limits, yes; but in fact if we talk about these three springs like Hunyadi Matyas, Hunyadi Arpad and

Hunyadi Janos, they are all separate from each other and each of these valleys has another geographical name.

Cross-Q. 98. You have spoken in your direct examination of various controversies between the Apollinaris Company, Limited, and the firm of Andreas Saxlehner. Did your father, Andreas Saxlehner, during his lifetime, or your mother, since his death, and prior to the termination in 1896 of the Apollinaris contract, ever bring suit against the Apollinaris Company to cancel said contract on the ground that said Apollinaris Company had not kept the terms of said contract?

336 A. I don't know that exactly. I don't think that we ever did. It might have been stated in our defense that the Apollinaris Company did not keep the provisions of the contract.

Cross-Q. 99. But that is not exactly answering my question. What I want to know is whether your father in his lifetime and your mother since his death and during the continuance of the said Apollinaris Company, between the years 1876 and 1896, ever brought suit against said company to cancel said contract on the ground that they had not complied with its terms?

A. I think in Vienna we had a lawsuit where we sued the Apollinaris Company for not keeping the terms of the payments or so, and maybe in that lawsuit it was mentioned that by their doing so they did not keep the points of the contract.

Cross-Q. 100. In your last answer do you speak of your personal knowledge or from hearsay?

A. Well, if I say this I know it from the lawyers only. I do not remember it directly at the time.

Cross-Q. 101. When was this lawsuit of which you have so vague an idea and only hearsay knowledge?

A. It must be a very long time ago, perhaps in the beginning of 1880. I was a little boy at that time.

Cross-Q. 102. But so far as you know during the twenty years of its continuance the Apollinaris Company, Limited, kept the terms of said contract, did they not?

A. Yes, sir; and so did we. I wish to remark that very often in the lawsuits it might have been that we accused each other, but it has never been decided.

(Mr. Coe: The last clause of the answer is objected to as irresponsive.)

Cross-Q. 103. You have spoken of a conversation which took place away back at or about the beginning of the Apollinaris contract in 1876 between Mr. Steinkopf, the president of the Apolli-

337 naris Company, and your father, Andreas Saxlehner, with reference to the Freiderichshall water. Do you mean to say that you were present at such conversation?

A. No, sir; and I admit that I know this for instance through my family members and lawyers who told me.

Cross-Q. 104. You have spoken about certain legal proceedings in England brought by the Vichy Company to cancel the Hunyadi Janos English trade-mark, which as I understand you they had

registered in the name of the Apollinaris Company, Limited. Don't you recollect that that trade-mark was stricken off the register on the ground that the word "Hunyadi" in the collocation words "Hunyadi Janos" was a geographical name and therefore not registerable under the English trade-mark law?

A. No.

Cross-Q. 105. You will not swear however, that that was not the case, will you?

A. I know that at that time there was a talk about it, whether it was a geographical name or not, but this is the first time I have heard that in the court it would have been decided that it was a geographical name.

Cross Q. 106. You will not, however, undertake to say that this was not the ground, or one of the grounds, on which such trade-mark was stricken off the registration in said English trade-mark litigation, will you?

A. Well, I don't know about that exactly, only the best proof is that in 1896 the Hunyadi Janos and Hunyadi name has been acknowledged as a valid and good trade-mark.

(Mr. COE: The last clause of the answer is objected to as irresponsive and volunteered.)

Cross-Q. 107. You have spoken about the Apollinaris Company making the Red Diamond brand on the Hunyadi Janos labels as a distinguishing mark. Did they not, at the same time, in America, put such Red Diamond Brand label on as a distinguishing mark?

A. Yes.

338 Cross Q. 108. Do you recollect how long ago that was?

A. I don't know that. I saw it when I came here and then naturally I informed myself and asked around here.

Cross Q. 109. You know, however, that that Diamond brand had been put upon the Hunyadi Janos bottles and labels by the Apollinaris Company, Limited, for some years prior to 1895, when you first came to this country?

A. Yes, I heard it in the London lawsuit. They put it on the bottles, I think, in 1890 or 1891.

Cross-Q. 110. And in the United States at or about the same time, did they not?

A. Yes; as I heard afterwards. I don't know.

Cross-Q. 111. At what place was the main label as shown on Complainant's Exhibit Complainant's Former Bottle, put on such bottle to your knowledge during the continuance of the Apollinaris contract?

A. You mean the red and blue label?

Cross-Q. 112. Yes.

A. That was put on at Budapest.

Cross-Q. 113. As I understand you it was so put on at Budapest during the continuance of the Apollinaris contract prior to your father's death and since his death when your mother succeeded as owner of the spring?

A. Yes, sir.

Cross-Q. 114. And continued to be so put on until the termina
tion of the Apollinaris contract in 1896, did it not?

A. Yes; the main label.

Cross-Q. 115. So, as I understand you, this main label, from th
beginning of the Apollinaris contract with your father in 187
until its termination in 1896, was always put on at Budapest?

A. Yes, sir.

Cross-Q. 116. And by whom was this additional label or Diamon
Brand label put on?

A. By the Apollinaris Company. It was put on agains
339 our wish, and in 1891 we tried to make a motion in Englan
against this Red Diamond label.

(Mr. COE: The last clause of the answer is objected to as imma
terial and irrelevant.)

The WITNESS: Especially because they pasted it upon a ver
valuable testimonial in which the Hunyadi Janos water is recom
mended in preference to Friederichshall.

(Mr. COE: The last clause of the answer is objected to as irr
sponsive, volunteered and hearsay.)

Cross-Q. 117. You have spoken of certain suits which have bee
brought by your mother, Emilie Saxlehner, in this country agains
certain parties. These suits were not brought until after the term
nation of the Apollinaris contract, were they?

A. After the termination.

Cross-Q. 118. And the contract was terminated in March, 189
was it not?

A. Yes, sir.

Cross-Q. 119. And these suits were not brought until 1897, wer
they?

A. I will have to look that up; I don't know exactly whether i
1896 or 1897.

Cross-Q. 120. But none of them were brought in 1895 and non
of them were brought prior to the termination of the Apollinari
contract, were they?

A. No, sir.

Cross-Q. 121. You have spoken of a suit brought in Englan
against the Apollinaris Company with reference to the word "Apent
Uj Hunyadi" and so forth, and you have also spoken about a sui
brought in the United States against Charles Graef & Co. as agent
of the Apollinaris Company for substantially the same cause o
action as in the English suit. In said American suit did you no
make a motion in the spring of 1897 for a preliminary injunctio
in such suit?

A. Yes.

340 Cross-Q. 122. And this suit was brought in the spring
1897, was it not?

A. I think so; yes, sir; some time in May, 1897.

Cross-Q. 123. And this preliminary injunction was denied b
Judge Lacombe, was it not?

A. Yes, sir; it was denied.

Cross-Q. 124. In such motion for a preliminary injunction Julius Prince filed an affidavit on the part of the defendants, did he not, dated the 19th of May, 1897?

A. I think there was an affidavit of Prince's.

Cross-Q. 125. And in this affidavit dated May 19, 1897, the two letters you have referred to from the Apollinaris Company, Limited, to your father, Andreas Saxlehner, or copies thereof, are set forth, are they not?

A. That I don't remember now exactly.

Cross-Q. 126. You have referred to said letters in your direct examination by stating that you didn't know anything about them until a few days ago, when I called attention to them during the course of this litigation. Are you not mistaken in that? Did you not know about them at the time they were incorporated in this affidavit of Mr. Prince filed on the part of the complainant in this American Apenta litigation?

A. I don't know; I would have to look up the affidavits.

Cross-Q. 127. You will not swear that you did see the copies at that time, will you?

A. No, I wouldn't swear to that.

Cross-Q. 128. Don't you recollect that in the fall of 1897, while you were testifying as a witness on the part of the complainant in this suit of Saxlehner against Eisner & Mendelson, I called your attention to such letters in the cross-examination?

A. Well, I remember that, but I didn't know which letters you meant then, because you asked me whether I knew about correspondence between the Apollinaris Company and Saxlehner.

Cross-Q. 129. Are you not mistaken in regard to this in
341 such testimony; isn't it your personal recollection that I referred you especially to these letters in this litigation?

A. I know, Mr. Coe, that you asked me about letters between the Apollinaris Company and our house from the year 1888 or 1887.

Cross-Q. 130. And that is all that you recollect now?

A. That is all I know.

Cross-Q. 131. I ask you these questions especially, for your direct examination would give the impression that you did not know anything about these letters or no reference had ever been made to them until a few days age when I was examining Mr. Haldenstein in this case; and these questions that I have asked you in this present question are directed to whether or not you were not mistaken in regard to that, and whether you hadn't earlier knowledge of these letters or copies thereof. I now ask you whether you didn't have earlier knowledge of these letters?

A. Mr. Coe, it can't be earlier back than the Graef motion, and I don't remember even that now that I would have seen those letters.

Cross-Q. 132. And that is the best answer you can now give to this question, is it?

A. That is what I can answer.

Cross-Q. 133. Did you ever know of a spring registered under the Hungarian laws under the name of Hunyadi Corvin?

A. I think that is our trade-mark, or it has been. If I am well informed, we had two trade-marks, Hunyadi Erszebet and Hunyadi Corvin, but those trade-marks were dropped and they are no more registered.

Cross-Q. 134. When did you drop them?

A. I couldn't say that. I heard a short time ago that they are no more registered for us. We dropped them probably after the 1896 litigation.

Cross-Q. 135. These trade-marks represented two springs, did they not?

A. That I don't know exactly; I think so.

342 Cross-Q. 136. Where were those springs situated?

A. That I couldn't tell you.

Cross-Q. 137. But your firm owned those springs, did they not?

A. Well, we must have bought them, but I don't know where they were.

Cross-Q. 138. Were they not in Hungary?

A. Yes.

Cross-Q. 139. Were they near Budapest?

A. Yes, I think so, because we had no more such springs but near Budapest.

Cross-Q. 140. When did you buy them?

A. I have no idea of that.

Cross-Q. 141. In the beginning of your direct examination you spoke of what you called a certain protest made by your father against the registration of the Hunyadi Matyas spring. Isn't this protest you speak of the litigation with reference to which documents have been offered in evidence in this case and called generally the 1873 Hungarian litigation?

A. Yes, sir; they are in evidence.

Cross-Q. 142. On July 6, 1893, your mother, Emilie Saxlehner, purchased the Hunyadi Arpad and Hunyadi Bela springs, did she not?

A. Yes, sir.

Cross-Q. 143. The Victoria and Rakoczy also?

A. Yes, sir. Well, I don't know whether the Rakoczy was purchased; there were several wells at those springs under different names. I know the Hunyadi Arpad was there and the Victoria.

Cross-Q. 144. Do you know what the purchase price for those springs was?

A. I think 225,000 florins.

Cross-Q. 145. Didn't you know at the time of such purchase that Hunyadi Arpad and Hunyadi Bela had been selling under those names in blue and red labels in the United States?

343 A. No; I had no direct knowledge of that.

Cross-Q. 146. What do you mean by direct knowledge in your last answer?

A. I didn't see any letter or any writing wherein such a fact would have been mentioned, or I don't even believe that in 1893 somebody of my house or my family would have told me that Hunyadi Arpad is selling in America.

Cross-Q. 147. But you will not swear, will you, that your mother, Emilie Saxlehner, or representatives of your firm, or somebody connected with it, did not know that in 1893, when you purchased the Hunyadi Arpad and Hunyadi Bela springs, such waters were selling in the United States under those names?

(Mr. KNAUTH: Objected as incompetent and impossible to answer.)

A. I couldn't swear for anybody else but for myself.

Cross-Q. 148. You won't undertake to say, however, that Emilie Saxlehner did not know, or her manager, Mr. Richter, or somebody connected with the management of the business, of the sale of Hunyadi Arpad and Hunyadi Bela in the United States prior to 1893?

(Mr. KNAUTH: Same objection.)

A. No, I couldn't swear to that.

KALMAN SAXLEHNER.

(Adjourned to Saturday, March 26, 1898, at 1 o'clock p. m.)

344 NEW YORK, *March* 26, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

MAURICE LEON, called as a witness on behalf of the complainant, in rebuttal, and having been duly sworn by a notary public in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Maurice Leon; I am over the age of 17; residence, 169 West Ninety-third street; occupation, clerk.

Q. 2. Are you a clerk in the office of complainant's solicitors, Briesen & Knauth?

A. I am.

Q. 3. Did you ever go to the drug store called the Astor House pharmacy, at the southwest corner of Broadway and Barclay street?

A. I have, several times.

Q. 4. Do you remember a peculiar incident in the month of January, 1898, on the occasion of one of your calls there?

A. I do; shall I relate it?

Q. 5. Yes, just state it.

(Mr. COE: Objected to as immaterial and irrelevant.)

A. On the second week, I think, of the month of January, I went into the drug store of, I don't remember the name—Seabury, I believe—and asked for a glass of Hunyadi water. I might as well say here that I had gone feeling myself the need of it, and the clerk brought out from the counter, right opposite the soda-water counter, a bottle. He had his hand on the label, so that I couldn't see what kind of a bottle it was. The general appearance of it was that of

the Hunyadi Janos, as far as I could see. Then he poured that water into a glass and replaced the bottle, still having his
345 hand upon it, into the closet. As he was closing the door, I saw that the bottle was a bottle of Hunyadi Matyas water. I drank the water, and came back to this office and related to you what I had experienced.

Q. 6. Do you remember what words you used when you demanded this kind of water?

(Same objection.)

A. I asked for a glass of Hunyadi water.

Q. 7. Do you know what the clerk gave you afterwards in answer to this request?

(Same objection.)

A. He gave me a glass of Hunyadi Matyas water.

Q. 8. Do you know the bottles and labels of the Hunyadi Janos water?

A. I do.

Q. 9. How long have you known the Hunyadi Janos water?

A. Ever since I can remember; at least eight or ten years.

Q. 10. Did you ever before use it for your health?

A. I have; very often.

Q. 11. Did you have any instructions when you went to that drug store, or did you go there of your own motion?

A. I had no instruction whatsoever; I went there on my own motion.

(Direct examination closed.)

(No cross-examination.)

(Signature waived.)

(Complainant's counsel offers in evidence a translation of complainant's circular of decisions, and the same is marked "Complainant's Exhibit Translation of Circular of Decisions, March 26, 1898, J. A. S., ex'r," the same being received subject to correction at any time previous to the hearing of this cause.

Defendant's counsel objects to the introduction of said
346 translation so marked in evidence as an exhibit as immaterial and irrelevant to the issues in this cause.)

FREDERICK JACOB ANDRES, called as a witness on behalf of the complainant, in rebuttal, having been duly sworn by a notary public by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Frederick Jacob Andres; age, 59; residence, Boston, Mass.; occupation, commission merchant.

Q. 2. Did you ever receive from the firm of Mattoni & Wille, of Budapest, a shipment of bitter water here in this city?

A. Yes.

Q. 3. Do you remember when it was, in what year?

A. It must have been in 1885 or 1886, I forget which; I think it must have *have* been 1885.

Q. 4. Do you remember what kind of a label this bitter water bore?

A. The label of Hungarian bitter water, Matyas spring or Matyas quelle, with my name on it as agent. This is the label (referring to the label marked "For identification, Andres Label, March 14, 1898, J. A. S., ex'r").

Q. 5. Do you remember how many cases of bitter water bearing this label you received from Mattoni & Wille?

A. I think there were 121 according to the invoice.

Q. 6. Cases of fifty bottles each?

A. It is not possible for me to say; I should have to look up the invoice, if you haven't got it here.

(Complainant's counsel offers in evidence the label heretofore marked for identification as before stated, and the same is marked "In evidence, March 26, 1898, J. A. S., ex'r.")

Q. 7. Had you previous to that time received any other waters from the firm of Mattoni & Wille for sale; I mean bitter waters?

347 A. No.

Q. 8. Were you in Budapest in the year 1885, and previous to the sending of this water?

A. No, at the time of the exhibition of 1885, I was there. That was the time when we started the arrangement with great prospects to make millions out of it.

Q. 9. Millions out of what?

A. Millions of dollars out of the sale of bitter water.

Q. 10. Did you have any personal conversation with Mattoni in Budapest or in Vienna at that time?

A. No, I saw all the Budapest people and I saw Mr. Wille in Vienna about it. He is a resident of Vienna.

Q. 11. By Budapest people you mean the representatives of Mattoni at Budapest?

A. Yes, Mr. Kahn and I don't remember the other, but it is on the letters you have here.

Q. 12. Did you also receive any papers or documents relating to this bitter water from Mattoni & Wille when you were there?

A. Yes, that is the one (producing a pamphlet, Chemische Analyse, of Mattoni & Wille).

(Complainant's counsel offers in evidence the pamphlet heretofore marked for identification Exhibit Mattoni Pamphlet, and the same is marked "In evidence March 26, 1898, J. A. S., ex'r."

The introduction of said pamphlet in evidence is objected to by defendant's counsel as incompetent, immaterial and irrelevant.)

Q. 13. Did the firm of Mattoni & Wille show you at that time any labels for use on their bitter waters?

A. Yes, the same labels you have there.

Q. 14. Did they show you any other labels also?

A. They showed me quite a quantity of labels, but this was the one that had, according to their ideas, the most chance in the United States because it bore the name Hunyadi, and there
348 it was considered to be very salable because the name Hunyadi was known all over the United States.

Q. 15. When you had received this shipment of 121 cases in New York, what happened with reference to the sale of said water here?

A. The moment we distributed the water and advertised it and sent circulars by the thousands to all parts of the United States, all at once the Apollinaris Company put an injunction on it and stopped me from going on and selling it.

Q. 16. Did you employ any attorneys to defend the suit of injunction which the Apollinaris Company brought?

A. Yes, I appointed Salomon & Dulon to get all the evidence and all the papers and authorized them in the name of Mattoni & Wille to defend me.

Q. 17. What became of this bitter water marked with this label which was here in your hands?

A. I sent back the warehouse certificate of the water which was the property of Mattoni & Wille, and I don't know how they disposed of it; I can't tell.

Q. 18. Was it here on your hands for any length of time, that shipment?

A. Well, it must have been here, I should think, about twelve months or so; I can't tell; from the correspondence you might see how long it was here.

Q. 19. Did you receive from Mattoni & Wille about the end of November, 1886, a letter which I now show you?

A. Yes, I got that letter; the letter is dated the 16th of November, 1886.

Q. 20. Was there a label inclosed with this letter?

A. Yes; it was inclosed in the letter and there was a parcel or package of 3,200 labels, the same as this one sent to me, to serve to relabel the water that I had here with this label, because it shows no Hunyadi on it at all.

(The label referred to by the witness has already been marked "Complainant's Exhibit Andres Second Label.")

349 Q. 21. I notice that on the wings of this label there is written in blue pencil, "Sole agent in U. S. Fr. Jac Andres, 30 Whitehall street, New York;" do you know who wrote those words in blue pencil?

A. I wrote it myself; that is my own handwriting.

Q. 22. Did you write them at the time you received this letter?

A. At the time I received it at once, because I was in hopes that the bitter water could be sold under this label and I had given this to the printer to print this on, but we stopped it because the Apollinaris Company wouldn't allow us to touch it. These 3,200 labels that were sent were intended to be printed that way, and that should have been cut off (pointing to the words "P. Scherer & Co.," on the bottom of the label).

Q. 23. Do you remember what you did with the 3,200 labels which you have testified you received from Mattoni & Wille at that time, like this label?

A. Yes; I remember I had them in the office for a long while. I don't remember what became of them now. If we looked for them we might find them, but it is doubtful.

Q. 24. Do you know what has become of the bitter water contained in these 121 cases?

A. No, my impression is that there were instructions to sell it, but I don't know whether it was really sold.

Q. 25. Had you ever, previous to this shipment in 1885, received any bitter water from the firm of Mattoni & Wille which bore the name Hunyadi Matyas?

A. No.

(Direct examination closed.)

(No cross-examination.)

(Signature waived.)

(Complainant's counsel offers in evidence a letter dated November 16, 1886, referred to by the witness, and the same is marked "Complainant's Exhibit Letter to Andres, March 26, 1898, J. A. S., ex'r."

350 Complainant's counsel also offers in evidence a translation of those portions of the letter relating to bitter water, and the same is marked "Complainant's Exhibit Translation of Letter to Andres, March 26, 1898, J. A. S., ex'r.")

SAMUEL SHULMAN, recalled for complainant, in rebuttal, having been already duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Henry Marquet, son of Louis Marquet, has testified on behalf of the defendant in this case, that on February 15, 1897, there were employed in his father's drug store himself, a lady (his aunt) and a clerk whom he describes as a very tall man, dark complexioned, who is now dead. He also has testified that his father has gray hair and neither the father nor the clerk answer to the description given by you of the man who sold you the bottle of Hunyadi Matyas water at that store. Is your recollection of the man who served you this bottle on that day distinct and certain?

A. Yes.

Q. 2. Do you remember distinctly the color of his hair?

A. Yes, sir.

Q. 3. What was the color of his hair?

A. Red.

Q. 4. Can you describe him otherwise?

A. He wasn't very thick, and he was about a little higher than myself and rather thin.

Q. 5. Can you tell about how old he was according to his appearance?

A. I could tell he wasn't over thirty years.

Q. 6. Have you endeavored to bring the witness Ginsberg here again today?

A. Yes, sir. I was there with my wagon and he dressed himself, and when he was by the door he couldn't get out. I saw
351 that myself, and I didn't undertake to run the risk with the man; so that there shouldn't be the blame on me afterwards if he got sick again because he has been sick.

Q. 7. How long has he been sick?

A. Two weeks.

Q. 8. So he did not come with you?

A. No, sir.

(Direct examination closed.)

(No cross-examination.)

SAM. SHULMAN.

PIERRE LUIGI FOCARDI, called as a witness on behalf of the complainant, in rebuttal, being first duly sworn by a notary public by consent in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. Please state your name, age, residence and occupation.

A. Pierre Luigi Focardi; age, 21; residence, Garwood, New Jersey; occupation, electrical workman.

Q. 2. In whose employ are you?

A. C. & C. Electrical Manufacturing Company.

Q. 3. Of Garwood?

A. Yes, sir.

Q. 4. Did you, in the month of December, 1896, go to the drug store of Rudolph Gies, at No. 396 Third avenue, in the city of New York, to purchase a bottle of bitter water?

A. I did.

Q. 5. What did you demand when you went into that store?

A. A bottle of Red Diamond brand of Hunyadi water.

(Mr. COE: The answer is objected to as not proper rebuttal testimony.)

Q. 6. Whom did you find in the drug store?

(Same objection.)

A. The clerk.

352 Q. 7. What did he say when you asked him, as you have stated.

(Same objection.)

A. He went into the window, I believe, and picked up a bottle from amongst the bottles in the window and wrapped it up.

Q. 8. Did he hand you that bottle wrapped up in paper?

(Same objection.)

A. He did.

Q. 9. Did you ask him anything about it when he handed it to you?

(Same objection.)

A. I asked him if it was the Red Diamond brand.
Q. 10. What did he say?
A. He said "Yes, sir."
Q. 11. Did you pay for the bottle?
A. I paid eighteen cents for the bottle.
Q. 12. What did you do with the bottle thereupon?

(Same objection.)

A. I brought it to a friend of mine.
Q. 13. Did you afterwards unwrap the bottle?

(Same objection.)

A. Not until I got home or at least I unwrapped it when I got to my friend's.
Q. 14. What was the bottle which the clerk handed to you?

(Same objection.)

A. The bottle was a bottle of Hunyadi Matyas.
Q. 15. Did you mark it at that time so as to identify it?

(Same objection.)

A. Yes.
Q. 16. How did you mark it?

(Same objection.)

A. With my initials.
Q. 17. P. L. F.?
A. Yes.
353 Q. 18. Are these initials which appear on the bottle here before you in your handwriting?

(Same objection.)

A. Yes.

(Complainant's counsel offers in evidence the bottle referred to by the witness and the same is marked "Complainant's Exhibit Focardi Bottle, March 26, 1898, J. A. S., ex'r."

Mr. COE: Same objection to the introduction of the bottle.)

(Direct examination closed.)

Cross-examination by Mr. COE (*de bene esse*, conditionally):

Cross-Q. 19. What sort of a looking man was this clerk?
A. It is hard to remember now; it is a year and a half ago; I believe he was a young man.
Cross-Q. 20. Is that the best description you can give of his appearance?
A. I think he was an apprentice or a clerk. I can hardly remember now, you see so many people.

Cross-Q. 21. Then, as I understand you, you have no distinct recollection that he waited upon you at this store?
A. I wouldn't be able to recognize him.
Cross-Q. 22. It wasn't Mr. Gies?
A. I believe Mr. Gies would be a more elderly person.
Cross-Q. 23. You don't know Mr. Gies by sight?
A. I do not.

(Cross-examination closed.)
(Signature waived.)
Adjourned subject to notice.

354 In the Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER
vs.
EISNER & MENDELSON COMPANY. } In Equity.

Depositions taken on behalf of the complainant in rebuttal, *de bene esse*, under sections No. 863, &c., of the Revised Statutes of the United States, before Eugene Mackey, notary public, at Titusville, Crawford county, State of Pennsylvania, pursuant to the annexed notice of March 29, 1898, at 10.30. a. m.

Present: Otto v. Schrenk, of counsel for complainant, and Charles G. Coe, of counsel for defendant.

J. E. PHILLIPS, a witness called on behalf of complainant, having been first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testifies as follows:

Q. 1. Please state your name, residence, age and occupation?
A. John E. Phillips; aged 55; occupation, druggist.
Q. 2. How long have you been in business as druggist?
A. Thirty years at least.
Q. 3. Are you acquainted with Hunyadi Janos water; and if so, how long have you known of it?
A. I have known the water for twenty years.
Q. 4. Have you sold Hunyadi Janos in your business, and if so, for how long?
A. I have. I sold it six years.
355 Q. 5. Did a person representing himself to be a representative or agent of the Eisner & Mendelson Co. call upon you in about the month of November, 1896?

(Defendant's counsel objects to the question as incompetent, irrelevant and immaterial.)

A. He did.
Q. 6. Please state what conversation he had with you; please give the substance of said conversation?

(Same objection and as not proper rebuttal testimony.)

A. As near as I can remember he called my attention to the Hunyadi Matyas water, representing it to be a water equally as good as the Hunyadi Janos and much cheaper in price. He also gave me the impression that the Hunyadi Janos water could not be obtained in the market, after the stock on hand in the hands of the wholesale dealers was exhausted. He also conveyed to my mind the impression that the Hunyadi Janos water would not be bottled as such in future. That is all I can remember of the conversation with reference to the two waters; with reference to the connection between the two waters, one being on the market and one going out.

Q. 7. These impressions were conveyed to your mind by statements made by such agent of Eisner & Mendelson Co., were they not, he having made statements substantially as contained in your last answer?

(Same objection.)

A. They were.

Q. 8. And after such conversation did you order from the Eisner & Mendelson Co. a box of Hunyadi Matyas waters?

(Same objection.)

A. I did.

Cross-examined *de bene esse* and conditionally by defendant's counsel:

Cross-Q. 9. You have stated in your direct examination that you have sold Hunyadi Janos water for about six years. During that period had you known of the Hunyadi Matyas water?

356 A. I had not.

Cross-Q. 10. Did you keep the case of Hunyadi water that you bought in November, 1896?

A. I did.

Cross-Q. 11. How many bottles of Hunyadi Matyas water were in this case?

(Objected to by complainant's counsel as immaterial and irrelevant.)

A. There were fifty bottles in the case.

Cross-Q. 12. And you sold those fifty bottles, did you not?

A. I did.

Cross-Q. 13. In selling these bottles you sold them as Hunyadi Matyas water, did you not?

A. I sold them as Hunyadi water.

Cross-Q. 14. Look at the order now shown you and state if that is not the order for the case of Hunyadi Matyas water spoken of in your direct examination?

(Objected to as immaterial and irrelevant.)

A. Undoubtedly that is the order. That is my signature.

(Defendant's counsel offers said order in evidence and it is marked "Defendant's Exhibit Phillips November Order, Eugene Mackey, commissioner.")

Cross-Q. 15. You had correspondence with the Eisner & Mendelson Co. with reference to this case of Hunyadi Matyas water, did you not?

A. I did.

Cross-Q. 16. Look at the letter now shown you, dated November 10, 1896, and state whether you did not write this to the Eisner & Mendelson Co.?

A. I did.

(Defendant's counsel offers the letter in evidence and the same is marked "Defendant's Exhibit Phillips Letter No. 1.")

Cross-Q. 17. Did you receive an answer to this letter?

A. I did.

Cross-Q. 18. Have you that answer; if so, please produce it?

357 A. I have it.

(Counsel for defendant, with the consent of counsel for complainant, introduces a press copy of said letter, the same to have the same force and effect as the original letter, and the said copy is marked "Defendant's Exhibit Phillips Letter No. 2.")

Cross-Q. 19. Look at the letter now shown you, dated November 12, 1896, and state whether or not said letter is your reply to this letter of November 11th to you?

A. It is.

(Defendant's counsel offers said letter in evidence, and it is marked "Defendant's Exhibit Phillips Letter No. 3.")

Cross-Q. 20. In this letter of November 12, 1896, you say you "enclose labels taken from a bottle of water." Did you enclose said labels in said letters?

A. I did.

Cross-Q. 21. Look at the labels now shown you, consisting of a Hunyadi Janos main label, a Diamond Brand label and a strip label, and state whether these are not the labels you so enclosed?

A. I believe they are.

(Counsel for defendant offers said labels in evidence, and they are marked "Defendant's Exhibit Phillips Hunyadi Janos Labels."

Complainant's counsel objects to the offering in evidence of said labels as immaterial, irrelevant and incompetent.)

Cross-Q. 22. Did not the Eisner & Mendelson Co. reply to your letter of November 12, 1896, to them by letter, dated November 14, 1896, and if so, please produce said letter of November 14, 1896?

A. They did, and this is the letter.

(Counsel for defendant, with the consent of counsel for the complainant, introduces a press copy of said letter, the same to have the

same force and effect as the original letter, and the said copy is marked "Defendant's Exhibit Phillips Letter No. 4.")

358 Cross-Q. 23. You paid the Eisner & Mendelson Co. for this case of Hunyadi Matyas water?

A. I did.

Cross-Q. 24. Did you after that order any more Hunyadi Matyas water from the Eisner-Mendelson Co.?

(Objected to by complainant's counsel as immaterial, irrelevant and incompetent and not proper cross-examination.)

A. I did. I ordered a case by postal card on or about July 10, 1897.

Cross-Q. 25. Look at the postal card now shown you and state if this is the postal card referred to in your last answer?

A. It is.

(Defendant's counsel offers said postal card in evidence, and it is marked "Defendant's Exhibit Phillips Postal Card."

Objected to by complainant's counsel as immaterial, irrelevant and incompetent.)

Cross-Q. 26. Did the Eisner & Mendelson Co. send a case of Hunyadi Matyas water on said order?

(Complainant's counsel objects for same reasons as to cross-Q. 24.)

A. They did.

Cross-Q. 27. You paid them for said case, did you not?

(Same objection.)

A. I did pay for it.

Cross-Q. 28. And the case contained fifty bottles of Hunyadi Matyas water, did it not?

(Same objection.)

A. It did.

Cross-Q. 29. And you sold said bottles of Hunyadi Matyas water to your customers, did you not?

(Same objection.)

A. I did.

359 Redirect:

Redirect Q. 30. Do you remember the exact conversation of the Eisner & Mendelson Co.'s agent with you in 1896?

(Objected to by defendant's counsel as incompetent, immaterial and irrelevant and not proper rebuttal testimony.)

A. I can't recall the exact conversation.

Redirect Q. 31. Did you make any note or memorandum of such conversation at the time or about that time, and if so, what was such memorandum?

(Same objection by defendant's counsel.)

A. I wrote a letter to Briesen & Knauth with reference to a circ lar received from them, stating substantially the same facts giv in the letter to Eisner & Mendelson.

Redirect Q. 32. I show you a latter dated November 12, 189 signed by you, and ask you whether that is the letter?

(Same objection.)

A. That is the letter.

(Complainant's counsel offers in evidence said letter and same marked "Complainant's Exhibit Phillips Letter to Briesen Knauth."

Defendant's counsel objects to same as incompetent, irrelevant a immaterial and not rebuttal testimony.)

J. E. PHILLIPS.

GEO. B. W. BROWN, a witness called in behalf of the complai ant, testifies as follows, having first been duly cautioned and swor

Q. 1. What is your name, occupation, residence and age?

A. Geo. B. W. Brown, druggist, Titusville, Pa.; age, 44.

Q. 2. How long have you been in the drug business?

A. About 26 years.

Q. 3. Do you know the Hunyadi Janos water, and if so, how lo have you known it?

A. About 20 years; as long as it has been on the market; alwa known it.

360 Q. 4. Do you remember a person representing himself be an agent or representative of the Eisner & Mendelson C calling upon you in about the month of November, 1896?

(Objected to as incompetent, immaterial and irrelevant and n rebuttal testimony.)

A. I do.

Q. 5. Will you please state what conversation was had at th time; please give the substance of the conversation as near as y can remember it.

(Same objection.)

A. Why, the representative of Eisner & Mendelson called up me about that date and after asking if I sold Hunyadi water, stated that I did sell the Hunyadi Janos. He represented to m that the Hunyadi Janos water was very rare, and in fact not o tainable, and on these representations obtained my order for o case of Hunyadi Matyas. I should judge that to be all there w of it.

Q. 6. Did he make any statements to you about the Hunya Janos being on the market or not?

(Same objection.)

A. Gave me to understand that it was not to be obtained.

Q. 7. And you subsequently received a box of Hunyadi Mat ordered by you, from Eisner & Mendelson Co?

(Same objection.)

A. Yes, sir.

Cross-examination by defendant's counsel *de bene esse* and conditionally without waiving objections:

Cross-Q. 8. Are you sure that the gentlemen who, as you say, represented himself as the agent of the Eisner & Mendelson Co., expressly stated that Hunyadi Janos was not on the market?

A. He gave me to understand that that was the case.

Cross-Q. 9. How did he give you to understand?

A. He stated, as I remember, that the Hunyadi Janos was no longer on the market and could not be obtained.

361 Cross-Q. 10. Did he refer to any bottle of Hunyadi Janos water in his conversation with you?

A. We merely talked of Hunyadi Janos water.

Cross-Q. 11. Hadn't you for several years known the Hunyadi Janos water as associated or identified with the Diamond Brand label?

A. Not specially.

Cross-Q. 12. Had not all of the bottles of Hunyadi Janos water that you had sold for several years prior to this conversation had on them, in addition to the Hunyadi Janos main label, a smaller label showing a red diamond?

(Objected to as incompetent, immaterial and irrelevant.)

A. It perhaps had, but I do not remember of giving that matter any thought or attention.

Cross-Q. 13. Didn't the agent state substantially, as you recollect, that this Diamond Brand Hunyadi Janos water was out of the market, or going out of the market?

(Objected to as immaterial, irrelevant and incompetent.)

A. Well, I don't remember that he specially mentioned that Diamond brand; only Hunyadi Janos as I remember it.

Cross-Q. 14. What did you do with the case of water you ordered from Eisner & Mendelson Co.?

A. I returned it to Eisner & Mendelson Co.

Redirect:

Redirect Q. 15. Had you ever heard of Hunyadi Matyas before this agent called upon you and talked to you about Hunyadi Matyas?

A. I don't think I had.

Recross-examination:

Cross-Q. 16. Had you ever heard of any other Hunyadi water besides the Hunyadi Janos water?

A. I had heard of the Hunyadi Apenta.

Cross-Q. 17. Have you ever heard during the last eight
362 years of any other Hunyadi water than the Hunyadi Janos and Hunyadi Arpad, and before November, 1896?

A. Not that I remember of.

Cross-Q. 18. You never heard of the Hunyadi Arpad water?

A. Not that I remember of.

Cross-Q. 19. Nor of the Hunyadi Laszlo?

A. Never heard of that.

Cross-Q. 20. Nor of the Hunyadi Lajos?

A. Never heard of it; we merely kept one kind.

Cross Q. 21. And that kind is the Hunyadi Janos water?

A. Hunyadi Janos.

Cross-Q. 22. And do you mean to say that you do not know for some four to five years prior to 1896 every botile of Hunyadi Janos water had on it the Diamond Brand label?

(Objected to as immaterial, irrelevant and incompetent.)

A. I don't remember it specially.

Cross-Q. 23. You are selling Hunyadi Janos water now?

A. Yes, sir.

Cross-Q. 24. Don't you know that the Hunyadi Janos water which you are selling now is without such Diamond Brand label?

(Objected — as immaterial, irrelevant and incompetent.)

A. I don't remember of noticing that fact.

Cross-Q. 25. Do you know or do you not know that since the expiration of the Apollinaris contract with the firm of Andreas Saxlehner in 1896 the bottles of Hunyadi Janos water have ceased to have the Diamond Brand label and that such Diamond Brand label Hunyadi Janos is now out of the market and was out of the market in the fall of 1896?

(Same objection.)

A. No.

GEO. B. W. BROWN.

It is stipulated by and between the counsel for the respective parties that the foregoing depositions be sent to Briesen & Knauth,
New York, N. Y., and the said depositions be filed by them
363 with the clerk of the United States circuit court for the southern district of New York.

NEW YORK, *March* 31, 1898—11 o'clock a. m.

Met pursuant to adjournment.
Adjourned until 2.30 o'clock this day.

2.30 P. M.

Met pursuant to agreement.
Present: Counsel as before.

EUGENE EBLE, a witness called on behalf of the complainant, in rebuttal, having been first duly sworn by a notary public, by consent, in the absence of the examiner, testified as follows:

Direct examination by Mr. KNAUTH:

Q. 1. What is your age, name, residence and occupation?

A. Eugene Eble; age, 21 years; residence, 174 West Eighty-second street, New York city; I am a law clerk with Briesen & Knauth.

Q. 2. Can you produce an advertisement of the defendant Siegel-Cooper Company in the New York Evening Sun of Wednesday, March 23, 1898?

(Mr. COE: Objected to as incompetent, immaterial and irrelevant, and not proper rebuttal testimony.)

A. Yes, I can, and now produce it herewith.

Q. 3. It has been contended on behalf of the defendants that the Hunyadi Matyas water is sold by retailers as Hunyadi Matyas water; did you make any inquiries of the defendant Siegel-Cooper Company with reference to the water advertised in this paper as Hunyadi water?

(Mr. COE: Objected to as incompetent, immaterial and irrelevant, and not proper rebuttal testimony, and in addition that the
364 question is not a fair statement of the testimony on the part of the defendant.)

A. Yes, sir; I went to the store of the Siegel-Cooper Company, Sixth avenue and Eighteenth street, yesterday, March 30, 1898, and went to the drug counter, where I inquired for a bottle of Hunyadi water.

Q. 4. Did you have with you the advertisement which you have produced?

(Mr. COE: Objected to as incompetent, immaterial and irrelevant, and not proper rebuttal testimony.)

A. Yes, sir; I did.

(Complainant's counsel offers in evidence the advertisement referred to by the witness, and the same is marked "Complainant's Exhibit Siegel-Cooper Advertisement, J. A. S., ex'r, March 31, 1898.")

(Mr. COE: Same objection.)

Q. 5. What did you inquire of the attendant in charge of the mineral-water counter there?

(Same objections by defendant's counsel.)

A. I asked for a bottle of Hunyadi water.

Q. 6. What did you see her produce?

(Same objections by defendant's counsel.)

A. She produced a bottle of Hunyadi Janos water and a bottle of Hunyadi Matyas water.

Q. 7. Did you ask her anything else?

(Same objections by defendant's counsel.)

A. Yes, sir; I asked her which was the genuine Hunyadi water, and she said that the one was bottled in this country and the other in Europe, that they were both from the same source.

Q. 8. To which did she refer as bottled in this country?

(Same objections by defendant's counsel.)

A. Hunyadi Matyas.

Q. 9. Did you ask her which was the water advertised by
365 the Siegel-Cooper Company as Hunyadi water at 14 cents, as shown by the advertisement?

(Same objections by defendant's counsel.)

A. Yes, sir.

Q. 10. What did she say?

(Same objections by defendant's counsel.)

A. I asked her, and she answered that that was the Hunyadi Matyas water.

Q. 11. Did you purchase a bottle of Hunyadi Matyas water from her?

(Same objections by defendant's counsel.)

A. I did.

Q. 12. How much did you pay for it?

(Same objections by defendant's counsel.)

A. Seventeen cents.

Q. 13. Did you also purchase a bottle of Hunyadi Janos water from her?

(Same objections by defendant's counsel.)

A. Yes, sir; I did.

Q. 14. How much did you pay for that?

(Same objections by defendant's counsel.)

A. Twenty-five cents.

Q. 15. Did you ask her anything else?

(Same objections by defendant's counsel.)

A. I asked her what other kind of Hunyadi water there was, and she produced a bottle of Apenta water, which I purchased.

Q. 16. Is this the bottle of Apenta water which you purchased, as stated by you?

(Same objections by defendant's counsel.)

A. Yes, this is the bottle of Apenta water that I bought.

(Complainant's counsel offers in evidence the bottle produced by the witness, and the same is marked Complainant's Exhibit Siegel-Cooper's Apenta Hunyadi, J. A. S., Ex'r, March 31, 1898.)

366 Q. 17. How much did you pay for this bottle of Apenta water?

(Same objections by defendant's counsel.)

A. I paid eight cents for it.

Q. 18. Do you find the word or name Hunyadi on the label or capsule of Apenta water?

(Same objections by defendant's counsel.)

A. (Witness examines bottle.) I find it upon the capsule of the said bottle.

Q. 19. Do you find it on the label?

(Same objections by defendant's counsel.)

A. No, sir; I do not.

Q. 20. Is the bottle which I now show you the bottle of Hunyadi Matyas water which you purchased of the defendant Siegel-Cooper Company on this occasion, as stated by you?

(Same objections by defendant's counsel.)

A. Yes, sir; it is. I have marked it with my initials, "E. E" and the date of purchase, March 30, 1898.

(Complainant's counsel offers the bottle in evidence, and the same is marked Complainant's Exhibit Siegel-Cooper's Hunyadi Matyas Bottle, J. A. S., ex'r, March 31, 1898.)

Q. 21. Have you stated all the conversation which you had with the attendant?

(Same objections by defendant's counsel.)

A. Yes, sir; I have.

(Direct examination closed.)

Cross-examination by defendant's counsel *de bene esse* and conditionally without waiving his objection:

Cross-Q. 22. At what counter of Siegel-Cooper's store did you buy these bottles of Hunyadi water?

A. At the drug counter, where they also sell mineral waters.

Cross-Q. 23. Was the attendant who waited on you male or female.

367 A. It was a young woman.

Cross-Q. 24. What part of the drug counter was it that she attended on you or was stationed near?

A. I should say it was that part which was devoted exclusively to mineral waters.

Cross-Q. 25. Please describe the appearance of this young woman who so waited upon you?

A. She had reddish hair, reddish eyelashes and was, I should judge, about five feet two inches tall, and presumably a Jewess. I observed that she had an apron, but I paid no attention to the other details of her dress.

Cross-Q. 26. State whether she had on a black dress or a dress of other color?

A. The sleeves of the dress were black.

Cross-Q. 27. Did she tell you where the Apenta water came from or was bottled?

A. She did not.

Cross-Q. 29. How did you happen to ask her so particularly with reference to the Hunyadi Janos and Hun-adi Matyas and not with reference to the Apenta?

A. Because she produced the Hunyadi Janos and the Hunyadi Matyas simultaneously.

Cross-Q. 30. When she produced these, did she ask you which of them you wished?

A. She did.

Cross-Q. 31. What did you tell her?

A. I wanted the genuine.

Cross-Q. 32. What did she say then?

A. She said, "Well, this is bottled in this country and the other (referring to the Hunyadi Janos) is bottled abroad, but they both come from the same source."

Cross Q. 33. And you have now given, in response to my cross-examining questions, the whole of this conversation? If not, please state what other conversation you had with her?

368 A. Nothing further than what I have already testified to as regards the Apenta water.

Redirect by Mr. KNAUTH:

Redirect Q. 34. Is the bottle of Apenta, which you have produced, a smaller bottle than the bottle of Hunyadi Matyas?

(Mr. COE: Same objection as to direct examination.)

A. Yes, sir; it is a smaller bottle.

EUGENE EBLE.

(Complainant's counsel produces a duly authenticated copy of a decree of the royal Hungarian minister of commerce in the suit of Emilie Saxlehner against New Hunyadi Company, Limited, and also an uncertified copy thereof, and offers in evidence the uncertified copy, and the same is marked Complainant's Exhibit Uj Hunyadi Decree, J. A. S., ex'r., March 31, 1898.

Objected to by defendant's counsel as immaterial and irrelevant; the lack of certification of the copy being waived.

Complainant's counsel also produces a duly authenticated copy

of the royal Hungarian minister of commerce in the suit of Emily Saxlehner *vs.* Louis Schmidthauer, and also a printed copy of said decree, uncertified, and offers in evidence the uncertified copy, and the same is marked Complainant's Exhibit Hunyadi Lajos Decree, J. A. S., ex'r., March 31, 1898.

Defendant's counsel states on the record that he does not object to the lack of certification of said copy, but objects to the same as immaterial and irrelevant to the issues in this case.

Complainant's counsel offers in evidence a duly authenticated copy of certificate of the Budapest chamber of commerce and industry, dated March 12, 1898, relating to the registration in Hungary, and a translation of the same, and the same are marked "Complainant's Exhibit Hungarian Certificate as to Word Registrations, March 31, 1898, J. A. S., ex'r."

369 Complainant's counsel also offers in evidence a duly authenticated copy of the complaint of Mrs. Emilie Saxlehner against the firm of Ignatz Ungar & Son of the year 1893, and a translation of the same, and the same is marked "Complainant's Exhibit Complaint against Ignatz Ungar & Son, March 31, 1898, J. A. S., ex'r."

Complainant's counsel also offers in evidence duly authenticated copy of the complaint of Emilie Saxlehner against Ignatz Ungar individually and a translation of the same, and the same are marked "Complainant's Exhibit Complaint against Ignatz Ungar, March 31, 1898, J. A. S., ex'r."

Defendant's counsel states upon the record that he makes no objection to any irregularity in the certificates or lack of authentication of each and all of the above exhibits introduced in evidence and makes no objection as to the correctness of the translations thereof, but objects to each and all of said exhibits and translations as otherwise incompetent, immaterial and irrelevant.)

(Complainant's rebuttal testimony closed.)

370 COMPLAINANT'S EXHIBIT No. 4—Apollinaris Contract.

Authentic translation from the German language.

Between the Appollinaris Company, Limited, London, and Mr. Andreas Saxlehner, of Budapest, the sole proprietor of the "Hunyadi Janos" bitter-water wells, the following covenant has been agreed to:

Mr. Andreas Saxlehner abandons to the Apollinaris Company the exclusive sale of his natural Hunyadi Janos bitter water in Great Britain, her colonies and dependencies, likewise so in all transmarine countries and places, Smyrna excepted, for a term of 10 say ten years. The prices are agreed to with a. v. flor. 6 per case of 25 1/1 bottles,—flor. 10 per case of 50 1/2 bottles—flor. 22.50 per 100 1/1 bottles, (loose)—flor. 19 per 100 1/2 bottles loose; an abatement of 20% in goods; depart from Pest or Buda franco railway carriage or ship, choice of the Apollinaris Company. The goods travel at the risk of the Apollinaris Company, Mr. Andrew Saxlehner obliging himself to faultless bottling and good bottles, and to most care-

ful package. Eight days after the receipt of the invoices the Apollinaris Company shall fulfil its payment through sight remittances upon Vienna under cash discount of 2%. In order that both parties may be preserved from excessive fluctuations in (discount) exchange they mutually agree that if at the day of arrival of a remittance meaning payment for water delivered the exchange for short London in Vienna would exceed 127%; the difference between 127% and the then effective exchange shall be compensated to Mr. Andrew Saxlehner by the Apollinaris Company; said compensation ceasing altogether if Mr. Andrew Saxlehner raises
371 his prices. And on the other hand should exchange sink below 100%, Mr. Andrew Saxlehner compensates the difference between 100 and the effective exchange up to 100%. Should Mr. Andrew Saxlehner through a lack of water be compelled to raise his prices on the continent, the Apollinaris Company shall take part in the like increase, while in the opposite case, that is to say if Mr. Andrew Saxlehner should be induced to lessen his continental prices, the Apollinaris Company shall partake of the same reduction. And it is agreed to in general, that the Apollinaris Company enjoying the same prices as on the continent always receives an abatement of 10 in goods in preference to the continental buyers of Mr. Andrew Saxlehner. The expression "natural Hunyadi Janos bitter water" means that water, which Mr. Andrew Saxlehner draws from his springs situate in the neighborhood of Buda and without any preparation or treatment thereof and which he in the last years sent everywhere. Whole (1/1) and (1/2) half bottles are the bottles and pints now used by Mr. Andreas Saxlehner. The standard analysis of the supplies of Mr. Andreas Saxlehner shall be the analysis made by Professor Dr. Baron de Liebig under 19th of July, 1870, which is printed upon the label affixed to each of the bottles. According to it the water contains in 10,000 parts 160.158 sulphate of magnesia—0.849 sulphate of potash—159.148 sulphate of soda—13.050 chloride of sodium—7.960 soda-salt—9.330 carbonic lime—0.001 silicic acid—0.042 alumina and sesquioxyde of iron—and 5.226 carbonic acid in free and half combined state. Upon the label the words: "Sole importers: The Apollinaris Company Limited, 19 Regent street, London, S. W." are to be printed. Regarding the United States it is agreed to, that the Apollinaris Company shall begin their trade only with the 1st of April, 1876, but on the other hand Mr. Andrew Saxlehner obliges him-
372 self henceforth not to accept orders arriving from the United States, but to make them over to the Apollinaris Company. And the Apollinaris Company oblige themselves not to raise any competition to Mr. Andrew Saxlehner upon the continent. Mr. Andrew Saxlehner obliging himself on his part to make over to the Apollinaris Company all and any orders arriving from countries reserved to the Apollinaris Company, also to assist and support the company everywise with respect to said orders and besides to refuse altogether such orders whereof he knoweth or has good reason to suppose that, they are intended for countries reserved to the Apollinaris Company, also to make over such orders

to the company. The Apollinaris Company have been made aware by Mr. Andrew Saxlehner that he has nominated and appointed an agent in Bavaria and another in Prussian Silesia, that is to say two agents, who enjoy a commission of 10%, furthermore there are one in Cologne and one in Wurtemburg with a 5% commission relating to orders obtained by them, besides that to several other larger purchasers a discount of 3 to 5% is conceded instead of the ordinary 2%. Now Mr. Andrew Saxlehner obliges himself to take care, that said preferences may neither directly nor indirectly injure the Apollinaris Company. The Apollinaris Company oblige themselves to take yearly at least one hundred thousand half or entire bottles and give order therefor three months before the first of January of the year of delivery, at the latest. In the year 1878 a minimal quantity of one hundred and fifty thousand whole or half bottles must be taken, otherwise this present agreement becomes null and void. In such a case neither party shall be entitled to claim damages. The supplies are to be distributed in equal instalments during such months wherein the receipt of a large quantity is feasible. Each monthly instalment ought to be taken in due time and the Apollinaris Company shall be authorized to demand the delivery of two instalments at once. Should Mr. Andrew Saxlehner
373 because of unavoidable obstacles (force majeure) lasting through a whole year be hindered from delivery, the Apollinaris Co. shall only be authorized to withdraw from the continuation of these presents without any claim to damages. On the other hand should the Apollinaris Company by "force majeure" be hindered from taking any quantity of the water ordered, during a whole year, Mr. Andrew Saxlehner shall be entitled to withdraw from these presents likewise without any claim to damages. And if under said circumstances the parties should nevertheless adhere to this contract, then, for the term of suspension neither a subsequent delivery nor a subsequent receipt shall be claimed. In case of shorter suspensions an additional supply or additional acceptance may be claimed. The Apollinaris Company oblige themselves not to introduce nor to sell any other bitter water during the term of the present agreement. The present covenant begins with the 1st of January one thousand eight hundred and seventy-six, ending with 31st of December eighty-five (1885)—the Apollinaris Company being entitled six months before the expiration of these presents to prolong them for further five years and besides that the Apollinaris Company at any time shall be authorized to withdraw from the present agreement against previous twelve months' notice. All rights and obligations agreed to by these presents on behalf of or against Mr. Andrew Saxlehner are *per se* likewise stipulated for or against any of his successors in right, any present or future co-proprietor of the Hunyadi Janos springs, whosoever should either personally, or by other persons, by lease, by transfer or by sale, may in future work the Hunyadi Janos springs. Any contest arising shall be definitely settled by the board of arbitrators of the Vienna exchange under renouncement of any appeal both parties

submitting to the respective award with such an effect as if
374 it were brought at Budapest by the board of arbitrators of Budapest exchange or at London by the supreme court of judicature in England.

Given at Munich 14th of February 1876. Sig. Andreas Saxlehner. In the presence of Herr Schultes as witness: (50 kreuz. stamp.) Sig. Aug. Schultes. For the Apollinaris Company Limited: Sig. E. Steinkopf. Sig. George Smith (L. S.) March 3, 1876. Witness to the signature of George Smith: Sig. William Howard, 15 Waterloo place, S. W. (L. S.)

Additional agreement to the covenant agreed to at Munich, 14th of February 1876 and London, 3rd of March 1876 between Mr. Andrew Saxlehner of Budapest and the Apollinaris Company Ld. London. The Apollinaris Company Ld. have been authorized by Mr. Andrew Saxlehner to prolong above agreement expiring 31st of December, 1885, for further fifteen years beginning with 1st of January, 1886 if said company makes use of above authorization by a declaration in due form and not later than 30th of June (1877) 1885. Budapest, 15th of February, 1877. Sig. Andreas Saxlehner. In the presence of Herr Augustus Schultes as witness. Sig. August Schultes, London 19th of January, 1877. For the Apollinaris Company Ld. Sig. George Smith (L. S.) Sig. E. Steinkopf. In the presence of William Howard as witness: Sig. William Howard (L. S.)

Budapest 15th of February 1877. To the Apollinaris Comp'y Ld., 19 Regent street London S. W. Conform- to the conference held with your Mr. Steinkopf I agree thereto that you undertake the sale of Friedrichshall bitter water. Respectfully Andreas Saxlehner m. p.

375 Budapest, 8th of February 1878. To the Apollinaris Comp'y Ld. London. By these presents I oblige myself to fill the orders you shall address me always only out of those wells which regarding their contents in salt are the richest and I shall from time to time notify you of the specific weight of the waters I send you. This present obligation does not cancel the other covenanted stipulations concerning the quality of the water but increases only the force of the existing obligations. Sig. Andreas Saxlehner.

I, the undersigned John Douglas Newton, a notary public, duly admitted by royal authority practising at London, do herewith certify, that at the request of the Apollinaris Company Limited I betook myself into said company's office N. 19 Regent street of this city, where I compared the paper-writing hereto annexed with the originals there presented me and found it a faithful copy thereof. Given at London, the ninth day of January, one thousand eight hundred eighty and five. *In testimonium veritatis.* Sig. J. Douglas Newton (L. S.)

No. 20 seen for legalization of above signature made by Douglas J. Newton sworn notary public of this place. From the imp. and roy. Austr. Hung. Consulate general London 9th of January 1885. Sig. Krapf (L. S.) due 1 fl. 5 kr. a. v.

Translated from the Hungarian.

(1 fl. stamp) 543/1885. I certify the present copy to be quite conform- to the legalized copy under no stamp presented to me by Dr. Maurice Mezei of Budapest advocate. Given at Budapest,
376 fourth of March one thousand eight hundred eighty-five. Legalization 9 kr. stamp 1 fl. total 1 fl. 95. Sig. Dr. Weiser Karoly roy. not. publ. (L. S.)

(2 flor. stamp.) Fully conform with the authenticated copy kept in the clerk's office of the Budapest roy. court of commerce and exchange, Budapest 3d of February 1887. The clerk: Sig. Derse Mihaly (L. S.).

N. 121. This is to certify the signature of the court's clerk Michael Derse, Budapest 4th day of February 1887. The presidency of the Budapest roy. court of commerce and exchange (L. S.) Csanady Gysiry m. p. president.

(N. 4849) I. M. 1887. This is to certify that above handwriting of George de Csanady the Budapest roy. court's of commerce and exchange's president and the common seal of above said court printed thereon are genuine, Budapest 5th of February 1887. By order of the minister of justice: Sig. Zador counsellor of ministry (L. S.).

[SEAL.]

I, the undersigned roy. notary public and of the court of justice sworn English interpreter do herewith certify that having carefully compared the present English document with the German and Hungarian words of the deed hereto annexed now and under my interpreter's oath I do declare the former a faithful translation of the latter. Whereof an act being required, I granted these
377 presents under my interpreter's seal and put my hand thereto. Budapest 5th of February 1887.

In fidem

[SEAL.] DR. CHAS. WEISER, *Not. Publ.*

COMPLAINANT'S EXHIBIT No. 18—1863 Certificate.

Translated from Hungarian.

Copy (1 fl. stamp). Official copy. 623/863. On the basis of the report of the town physician, stating that there is no objection against the analysis made of the chemical examination of the medicinal bitter water found on the Lágymányos by Andreas Saxlehner, permission is hereby granted to the said Andreas Saxlehner for selling the said medicinal water and salt and to give the spring the name of "Hunyadi spring," he being held to pay a sum of 15 florins for hospital purposes into the central cash office. Whereof notice shall be made to Andreas Saxlehner, to the central cash office and to the police office, while the report made on the 14th September 1862 of the chemical analysis shall be deposited at the archives. Passed in the meeting of the municipal council at Buda the 19th

day of January 1863. Read and delivered. Ország Sándor, chief clerc. (1 fl. stamp).

I hereby certify that this copy is perfectly conform- with the original document deposited at the Metropolitan archives. Budapest 26th February 1885. Small Lajos, deputy archivary. (L. S.) 676. Received the sum of 60 kr. 26th February 1885—that is say 60 kreutzer. Signed Zachár Erdelyi Szimelly (L. S.).

No. 3050/896. I hereby certify that the foregoing copy is verbally conform- with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner.
378 Budapest the 23d October, 1896. Signed Dr. Hajós Béla Odon, substitute appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Bela (L. S.).

No. 5376/96. Seen for the legislation of the foregoing signature and official seal of Dr. Hajós Béla Odon substitute of the royal notary public Gaszner Bela, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October, 1896. The president signed Bogisics (L. S.).

No. 59697/96. Seen for legislation of the foregoing signature and the official seal of the president of the Budapest royal tribunal. Budapest the 26th October 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial co-nsilor (L. S.).

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text. Budapest the 10th November 1896.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

Hungarian certificate.
[SEAL.] (Signature.)

The correctness — the opposite signature is hereby certified.
Wien, November 16, 1896.

Hungarian certificate.
(Signed) DR. ALEXY ALBERT.
[SEAL.]

By the chancellory of the imperial royal ministry of foreign affairs.
[SEAL.] PILAT.

U. S. CONSULATE GENERAL
At Vienna, Austria, } ss:

I hereby certify that the foregoing signature of Pilat chief
379 of bureau and the seal of the I. R. ministry of foreign affairs of Austria-Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November 1896.

[SEAL.]

MAX JUDD,
U. S. Consul General.

Fee No. 1589.
Am't rec'd $2.50.

COMPLAINANT'S EXHIBIT No. 19—Certificate of 1891.

Translated from Hungarian.

Copy. The Budapest chamber of commerce and industry. No. 2622/1891. Certificates. (1 fl. stamp.) The undersigned chamber of commerce and industry hereby officially certify that a trade-mark entitled "Hunyadi Janos" has been on the 12th December 1873, registered under number 10 in the trade-mark register kept by the register office of the undersigned chamber for Andreas Saxlehner of Budapest, bitter-water spring proprietor, for the legal protection of the Buda bitter water sold by the said Andreas Saxlehner, and that previously to this registration no trade mark has been registered for the protection of bitter water in the trade-mark register newly organized by this chamber in the year 1868. Budapest 8, August 1891. The Budapest chamber of commerce and industry. Signed Aebly vice-president. Signed Steinacker Odon secretary (L. S.)

No. 3024/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with 50 Kr. to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 22*th* October 1896. Signed Dr. Hajós Béla Odon substi-
380 tute appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Béla (L. S.)

No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajós Béla Odon, substitute of the royal notary public, Gaszner Béla, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October 1896. The president. Signed Bogisics (L. S.)

No. 59697/1896. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest royal tribunal. Budapest the 26th, 1896. For the royal Hungarian minister of justice: Signed Dr. Alexy Albert ministerial counsilor (L. S.)

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest the 10th November 1896.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

(Hungarian certificate.)
[SEAL.]
Hungarian certificate.
[SEAL.] (Signed by) DR. ALEXY ALBERT.

The correctness of the foregoing signature is hereby certified.
Wien, November 16, 1896.
By the chancellory of the imperial royal ministry of foreign affairs.
[SEAL.] PILAT.

381 U. S. CONSULATE GENERAL } ss:
At Vienna, Austria, }

I hereby certify that the foregoing signature of Pilat chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria-Hungary are genuine and entitled to full faith and credit.
Given under my hand and official seal this 16th day of November 1896.

MAX JUDD,
U. S. Consul General.

[SEAL.]

Fee No. 1594.
Am't rec'd $2.50.

COMPLAINANT'S EXHIBIT No. 20—Certificate of 1892.

Translated from Hungarian.

Copy No. 1801/1892 certificate (1 F. stamp) The Budapest chamber of commerce and industry hereby officially certify that a trade-mark entitled "Hunyadi Janos" has been on the 12th December, 1873, registered under number 10 in the trade-mark register kept by the register office of the undersigned chamber for Andreas Saxlehner bitter-water spring proprietor of Budapest for the legal protection of the Buda bitter water sold by the said Andreas Saxlehner and it is further certified that previously to that registration no such trade-mark was entered into the trade-mark register of this chamber in which the name or title "Hunyady" or "Hunyadi" or "Janos" was contained. Budapest 12, May 1892 The Budapest chamber of commerce and industry.
Signed Wahrman president. Signed Fritz Peter secretary (L. S.)
No. 3053/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner.
Budapest the 23d October, 1896. Signed Dr. Hajós Béla
382 Odon. Substitute appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Béla (L. S.)
No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajós Béla Odon substitute of the royal notary public Gaszner Béla, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October, 1896. The president. Signed Bogisics (L. S.)
No. 59697/96. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest royal tribunal.

Budapest the 26th October 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial co-nsilor. (L. S.) (Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 10th November 1896.

(Signature) IVAN BOSANYI, LL. D.,
[SEAL.] *Sworn Interpreter.*

(Hungarian certificate.)

(Hungarian certificate signed by)
[SEAL.] DR. ALEXY ALBERT.

The correctness of the foregoing signature is hereby certified.

Wien, November 16, 1896.

By the chancellory of the imperial royal ministry of foreign affairs.

[SEAL.] PILAT.

U. S. CONSULATE GENERAL
At Vienna, Austria, } *ss:*

I hereby certify that the foregoing signature of Pilat chief
383 of bureau and the seal of the I. R. ministry of foreign affairs of Austria Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November 1896.

[SEAL.] MAX JUDD,
U. S. Consul General.

Fee No. 1581.
Am't rec'd $2.50.

COMPLAINANT'S EXHIBIT No. 22—Transfer Certificate.

Translated from Hungarian.

Duplicate. The trade-mark registry office of the Budapest chamber of commerce and industry certificate (stamp 1 florin). The undersigned registry office hereby certifies that the trade-mark annexed on the other side was on the fourteenth day of July in the year eighteen hundred ninety, at twelve o'clock noon, in accordance with the II law of the year 1890 and S. 17 of the XX law of the year 1878, and on payment of 5 florins registration fee, entered in the trade-mark register sub No. 121 on behalf of Mrs. Emily Pelikin, widow of Andreas Saxlehner, Budapest bitter-water-spring owner, for the legal protection of "Hunyadi Janos" Buda bitter water brought into commerce by the said spring-owner, with the remark that the trade-mark is employed as label on the bottles. Budapest, 29th August, 1896. The trade-mark registry office of the

Budapest chamber of commerce and industry. Sigismund Liebstein, office manager and cashier Julius Makovetz, assistant clerk to the chamber and registrar, (L. S.). This trade-mark is a renewal of the trade-mark registered for Andreas Saxlehner on December 12th, 1873 sub No. 10 and transferred to the name of Mrs. Emily Pelikan widow of Andreas Saxlehner on June 23rd, 1889, Budapest, 29th August, 1896. Julius Makovetz M. P. assistant clerk to
384 the chamber and registrar (L. S.). It is certified that the signatures visible on the present trade-mark registration certificate are those of Sigismund Liebstein, office manager and cashier to the chamber and of Julius Makovetz assistant clerk to the chamber and registrar of trade-marks. Budapest 26th March, 1897. The Budapest chamber of commerce and industry. Hüttl M. P. vice-president, Peter Fritz m. p. secretary (L. S.). No. 21323/97 (Stamp 1 florin).

I hereby legalize the signatures of Theodore Hüttl and Peter Fritz, vice-president and secretary respectively of the Budapest chamber of commerce and industry. Budapest April 2nd, 1897. Tichtl M. P. ministerial councillor. (L. S.) (The label annexed to this certificate is a red and white Hunyadi Janos label as used on the continent of Europe.)
(Stamp.) No. 130/1897.

I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.
Budapest the 19th May 1897.

IVAN BOSANYI, LL. D.,
[SEAL.] *Sworn Interpreter.*

N. S. No. 189
1897

UNITED STATES CONSULATE,
BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the
[SEAL.] 24th day of May, 1897.

FRANK DYER CHESTER, *Consul.*

385 COMPLAINANT'S EXHIBIT No. 23—Label Transfer Certificate.

Translated from Hungarian.

The trade-mark registry office of the Budapest chamber of commerce and industry. Duplicate. Certificate. (Stamp 1 florin.) The undersigned registry office hereby certifies that at the request of Louis Richter, as legalised attorney of Mrs. Emily Pelikan, widow

of Andreas Saxlehner, Budapest bitter-water-spring owner, the three trade-marks annexed on the other side were, on the fourteenth day of July in the year eighteen hundred and ninety, at twelve o'clock noon, in accordance with the II law of the year 1890 and sec. 17 of the XX law of the year 1878 respectively and on payment of 15 florins registration fee entered in the trade-mark register sub Nos. 127, 128 and 129 for the legal protection of the "Hunyadi Janos" Buda bitter water brought into commerce by the said owner, with the remark that the trade-marks are employed as labels on the bottles. The present trade-marks transferred to the name of Mrs. Emily Pelikan widow of Andreas Saxlehner on June 23rd 1889 were originally registered for Andreas Saxlehner on December 30th 1884 sub Nos. 1028, 1029 and 1030. Budapest, 10th May 1892. The trade-mark registry office of the Budapest chamber of commerce and industry. Heller M. P. (L. S.) It is certified that the signature visible on the present trade-mark registration certificate is that of Arminius Heller official of the chamber and formerly registrar of trade-marks. Budapest, 26th March 1897. The Budapest chamber of commerce and industry. Hüttl M. P. vice-president Peter Fritz M. P. secretary (L. S.) No. 21323/97. I hereby legalise the signatures of Theodore Hüttl and Peter Fritz vice-president and secretary respectively of the Budapest chamber of commerce
386 and industry Budapest 2nd April 1897. Tichtl M. P. ministerial councillor. (L. S.)

(The three labels annexed to this exhibit are the red and white Hunyadi Janos label with the inscription of the Apollinaris Co. Ltd. as sole importer.

A red and blue Hunyadi Janos label with a similar inscription of the company as sole exporters.

And another red and blue label of the same kind with an additional script of Fred'k De Bary & Co. on the wings.)

(Stamp.)

No. 130/97. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 19th May, 1897.

[SEAL.] IVAN BOSANYI, LL. D.,
Sworn Interpreter.

UNITED STATES CONSULATE,
BUDAPEST, HUNGARY.

N. S. No. 187/1897.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the
[SEAL.] 24th day of May, 1897.

FRANK DYER CHESTER, *Consul.*

387 COMPLAINANT'S EXHIBIT No. 24—Hunyadi Certificate.

Translated from Hungarian.

Copy. The original provided with a one-florin stamp. N
15565/961. Official certificate. The districtual mayor's office hereb
certify upon request of Emily Pelikan widow of the late Andre
Saxlehner that it was her deceased husband, the founder of the fir
Andreas Saxlehner, who already in the year 1863 gave the nam
"Hunyadi" and since 1865 the name "Hunyadi Janos" to th
bitter water and bitter-water products by him produced and by th
name brought them into commerce so that water brought into trad
by the petitioner's late husband and since his death, viz., since th
year 1889, by the petitioner herself was always and still is marke
by the name "Hunyadi" and "Hunyadi Janos" respectivel
Budapest the 2nd October, 1896. The mayor's office of the 1st di
trict. Signed Paul Olhauser mayor.

No. 3059/1896. I hereby certify that the foregoing copy *is* ve
bally conform with the official copy stamped with one florin to n
exhibited by the Budapest registered firm Andreas Saxlehner. Bud
pest the 23*th* October 1896. Signed Dr. Hajos Bela Odon subs
stute appointed by decree No. 246/896 of the Budapest chamber
royal notaries of the royal notary public Gaszner Bela (L. S.)

No. 5466/1896. Seen for the legalization of the foregoing sign
ture and official seal of Dr. Hajos Bela Odon substitute of the roy
notary public Gaszner Bela, in virtue of sec. 67 of art. 35 of th
year 1874. Budapest, the 30th October 1896. The president signe
Bogisics. (L. S.)

No. 60771/1896. Seen for the legalization of the foregoing sign
ture and the official seal of the president of the Budapest roy
tribunal Budapest the 2*th* November 1896. For the roy
388 Hungarian minister of justice. Signed Dr. Alexy Albe
ministerial co-nsilor. (L. S.)

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do herel
certify that the foregoing translation *is* in every respect confor
with the hereto-annexed original Hungarian text. Budapest th
10th November 1896.

[SEAL.] IVAN BOSANYI, LL. D.,
Sworn Interpreter.

The genuineness of the foregoing signature is hereby certifi
Vienna, November 16, 1896, by the chamber of the imperial an
royal ministry of foreign affairs.

[SEAL.] PILOT.

U. S. CONSULATE GENERAL
At Vienna, Austria, } ss:

I do hereby certify that the foregoing signature of Pilot chief of bureau and the seal of the I. R. ministry of foreign affair- of Austria-Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November, 1896.

MAX JUDD,
[SEAL.] *U. S. Consul General.*

COMPLAINANT'S EXHIBIT No. 25—Certificate of Ownership.

Translated from Hungarian.

Copy. (1 fl. stamp.) No. 10570/1888. Official certificate.
389 On basis of the official researches as well as of the lists kept at the district mayor's office it is hereby certified that the bitter-water spring establishment situated in this district in that part thereof which is called Koérberck Örsöd and which is the property of Andreas Saxlehner, ever since the year 1865 is denominated by the name Hunyadi Janos both in general commerce and before public authorities and that it bears this name ever since the just-said date. Budapest 20 October 1888. The mayor's office of the 1st district Nr. 1786/108. The sum of two florins was paid in. Signed: Osztoics, mayor. Signed Dr. Komlody, deputy notary (L. S.).

No. 3045/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23*th* October 1896. Signed Dr. Hajòs Béla Odon substitute appointed by decree No. 246/96 of the Budapest chamber of royal notaries of the royal notary public Gászner Béla (L. S.).

No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajós Béla Odon substitute of the royal notary public Gaszner Béla, in virtue of S. 67 of art. 35 of the year 1874. Budapest the 24th October 1896. The president. Signed Bogisics (L. S.).

No. 59697/1896. Seen for the legalization of the foregoing signature and official seal of the president of the Budapest royal tribunal Budapest the 26th October 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert, ministerial councillor (L. S.).

(Stamp 1 fl. No. 275/1896.) I the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform- with the hereto-annexed original Hungarian text.

Budapest the 10th November 1896.

IVAN BOSANYI, LL. D.,
[L. S.] *Sworn Interpreter.*

390 The genuineness of the foregoing signature is hereby certified. Vienna, November 16, 1896. By the chamber of the imperial and royal ministry of foreign affairs.

[SEAL.] PILOT.

U. S. CONSULATE GENERAL } ss:
At Vienna, Austria, }

I hereby certify that the foregoing signature of Pilot, chief bureau and the seal of the I. R. ministry of foreign affairs of Au tria Hungary are genuine and entitled to full faith and credit.

[SEAL.] Given under my hand and official seal this 16th d of November, 1896.

MAX JUDD,
U. S. Consul General.

Fee No. 1569.
Am't rec'd $2.50.

COMPLAINANT'S EXHIBIT No. 26—Certificate of Ownership of Fir

(Translated from Hungarian.)

No. 8931/96 certificate. The undersigned chamber of commer and industry hereby does certify upon request of Mrs. Andre Saxlehner *née* Emily Pelikan as proprietor of the Budapest reg tered firm Andreas Saxlehner that it appears from the official doc ments filed with this chamber that the petitioner's late husba Andreas Saxlehner as founder of the firm Andreas Saxlehner h as early as 1863 provided with the name "Hunyadi" and sin the year 1865 with the name "Hunyadi Janos" the bitter wat and bitter-water products which he produced and brought the into commerce under the same names, and it is further certifie that this vater, brought into commerce by the late Andre
391 Saxlehner and since his death that is to say since 18 by the widow of Andreas Saxlehner *née* Emily Pelikan owner of the firm Andreas Saxlehner, has always been designate by the name "Hunyadi" and "Hunyadi Janos" respectively an is still called by the said name. Budapest 6, October 1896. Th Budapest chamber of commerce and industry. Signed Lanc president. Signed Fritz Péter secretary.

No. 3057/1896. I hereby certify that the foregoing copy *is* verbal conform with the official copy stamped with one florin to me e hibited by the Budapest registered firm Andreas Saxlehner. Bud pest the 23*th* October 1896. Signed Dr. Hajos Bela Odon substitut appointed by decree No. 246/1896 of the Budapest chamber royal notaries of the royal notary public Gaszner Bela. (L. S.)

No. 5376/1896. Seen for the legalization of the foregoing sign ture and official seal of Dr. Hajos Bela Odon substitute of the roy notary public Gaszner Bela, in virtue of sec. 67 of act 35 of the ye 1874. Budapest the 24th October 1896. The president sign Bogisics. (L. S.)

No. 59697/1896. Seen for the legalization of the foregoing sign ture and the official seal of the president of the Budapest roy tribunal. Budapest the 26th October 1896. For the royal Hu garian minister of justice. Signed Dr. Alexy Albert ministeri co-nsilor. (L. S.)

(Stamp.)

No. 278/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 10th November, 1896.

[SEAL.] IVAN BOSANYI, LL. D.,
Sworn Interpreter.

The genuineness of the foregoing signature is hereby certified, Vienna November 16, 1896, by the royal and imperial ministry of foreign affairs.

[SEAL.] (Signed) PILOT.

392 U. S. CONSULATE GENERAL } *ss:*
At Vienna, Austria, }

I hereby certify that the foregoing signature of Pilot, chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November, 1896.

MAX JUDD,
U. S. Consul General.

SAXLEHNER
vs.
EISNER & MENDELSON Co.

COMPLAINANT'S EXHIBIT SHULMAN PAPER, J. A. S.

One bottle Hunyadi Janos.

S. S. No. 215.

SAXLEHNER
vs.
EISNER & MENDELSON Co.

COMPLAINANT'S EXHIBIT GIES RECEIPT, J. A. S.

S. S. No. 212.

1 bot. Hunyadi.

18c.

393

SAXLEHNER
vs.
EISNER & MENDELSON Co.

COMPLAINANT'S EXHIBIT GIES RECEIPT (No. 2), J. A. S.

B. O. No. 230.

1 bot. Hunyadi.

18c.

R. Gies.

396 3rd Ave.

SAXLEHNER
vs.
EISNER & MENDELSON CO.

COMPLAINANT'S EXHIBIT GINSBURG PAPER, J. A. S.

S. G. 248.

One bottle Hunyadi Janos.

SAXLEHNER
vs.
EISNER & MENDELSON CO.

COMPLAINANT'S EXHIBIT CIRCULAR OF NOTICE, J. A. S.

Arthur v. Briesen. Antonio Knauth.

Briesen & Knauth, counsellors-at-law, 229 Broadway, New York. P. O. box 2979.

Caution.

To all who handle imitations of the Hunyadi Janos aperient water:

We are instructed to notify the trade, especially druggists and other dealers in aperient waters, that they should not sell such waters bearing the name "Hunyadi" or any combination of names containing the word "Hunyadi" or imitation of the label of the Hunyadi Janos water of Andreas Saxlehner, Budapest, Hungary.

394 It has come to our notice that violations of the genuine Hunyadi Janos label are on the market, also that several parties are putting up various imitations of the Hunyadi Janos water bearing the name "Hunyadi" in infringement of the trade-marks of Andreas Saxlehner.

You are hereby notified that if hereafter you should be found to sell any bitter waters, containing violations of the above trade-mark, suit will be promptly brought against you and an injunction and an accounting of profits demanded of the courts.

You will please give this matter your serious attention and not give us occasion to bring suit for violation of the trade-marks of a well-established and world-renowned firm. As a matter of fact druggists should be unwilling to sell goods which are not genuine.

There is but one water which has the right to bear the name "Hunyadi," and this is the "Hunyadi Janos" water of the firm of Andreas Saxlehner.

We remain yours truly,

BRIESEN & KNAUTH,
Attorneys for Andreas Saxlehner,
229 Broadway, New York City.

October, 1896.

395 COMPLAINANT'S EXHIBIT BILL AGAINST INTERNATIONAL COMPANY. March 1, 1898. J. A. S., Ex'r.

Bill of Complaint.

The Circuit Court of the United States for the Northern District of Illinois. In Equity.

To the honorable judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

The Eisner & Mendelson Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at the city of New York, in said State, and a citizen of said State, brings this, its bill of complaint, against the International Medicinal Mineral Water Company, a corporation organized and existing under and by the virtue of the laws of the State of Illinois, having its principal place of business at Chicago, in said State, in said northern district, and a citizen of the State of Illinois.

Your orator respectfully shows unto your honors that long prior to the commencement of this suit, the said Eisner & Mendelson Company, the complainant herein, was the sole lessee of a certain spring at Budapest, in Hungarian Austria, known as the Hunyadi Matyas spring, said spring having long been known to the medical world and to the general public as producing a bitter water having certain medicinal properties, on account of which said waters have become widely known and in general use throughout Europe and America, and this complainant, and the company from which complainant purchased its right to sell said waters, have
396 expended large sums of money in introducing and advertising the same.

Your orator further shows that to indicate the origin and genuineness of said waters, and to distinguish and identify the same, it has selected and used a bottle of peculiar size and color and surrounded and enveloped the same with a label of a peculiar combination of colors and designs, said label being printed in two colors; that is to say, blue with the middle section thereof (about one-third of said label), being of a reddish-brown tint, having upon it certain printed matter in blue and black type and certain figures and emblems and said other two sections having printed matter and directions in black type on one side and upon the other a formula and other printed matter, as is shown by the label hereunto annexed, and made a part hereof, marked "Complainant's Wrapper A," and as will more fully appear by the bottle deposited with the clerk of this court and ready to be produced as your honors may direct.

Your orator further shows that in addition to said bottle and label, and at the time the same were adopted by your orator, it originated, devised and adopted a cover or capsule of tinfoil to be applied and to close the head of said bottle, upon which said tinfoil an impres-

sion was stamped, as will appear by the capsule surrounding the said bottle so deposited with the clerk, as aforesaid.

Your orator further shows that said bottles with their labels and capsules have been used by it, and the parties from whom your orator purchased its right to use and sell the same, continuously and without any material change or variation whatever from the time of their adoption thereof, to wit, about the year 1887 until the present time. That vast numbers of said bottles, with their said labels, have been used, and the water contained in said bottles has been distributed and sold in large quantities throughout the United States and Europe, and by reason of said premises the said bottle
397 and label and said capsule, soon after their introduction as aforesaid, to wit, about the year 1887, came to be known in the markets of the United States and elsewhere as indicating the product of the Hunyadi Matyas spring of Budapest, Hungary, and as a genuine Hungarian bitter water.

Your orator further avers that it acquired and now holds and enjoys the exclusive right to the use of the said label, and each and every part thereof, as a label or trade-mark, and also an exclusive right to use said bottles and capsules in connection with said labels.

Your orator further shows that it acquired and now enjoys a right of property in said bottle, label and capsule, and in the combination of the same and use thereof in connection with the sale of mineral waters, and avers that it has a right of property, and the exclusive right to use as a trade-mark or label for Hungarian bitter water, a blue and reddish-brown label with printed matter thereon, and a tinfoil capsule and bottle of the peculiar size and color heretofore used by it.

Your orator further shows that the said International Medicinal Mineral Water Company, well knowing the rights of your orator in the premises and the existence of the bottles, labels, name, &c., hereinbefore referred to, and intending to trade upon the reputation of your orator's goods, has, since about the first day of July, A. D. 1892, and since your orator's rights in the premises were acquired as aforesaid, and prior to the filing of this, your orator's bill of complaint, wholly without your orator's consent and in violation of its rights, made use of false and misleading imitations of your orator's said bottle, label and capsule, and has unlawfully used such fraudulent imitations in connection with the sale of a manufactured, spurious and inferior water, not the natural water from the springs of your orator, nor indeed, from any spring in Hungary, but in connection with the sale of a water manufactured in the city of Chicago and
398 various other places in the United States, and not imported from said spring of your orator in Hungary, or from any other Hungarian spring—that is to say, the said defendant has at the time and place aforesaid, to wit, in the district aforesaid, and used, first, a bottle of the form, size and color of the bottle used by your orator—in fact, using in many instances bottles that had already been used by your orator; second, has used a blue and reddish-brown label of substantially the same size and appearance as that of your orator hereinbefore described; third, has printed upon said label a

collocation of words substantially the same as those of your orator, as is shown by the label and bottle filed with the clerk of this court and by said bottle sealed with the capsule used by defendant and enveloped in the label used by defendant and marked defendant's bottle, label and capsule ready to be produced as your honors shall direct, and, fourth: has used a capsule of tinfoil with an impression thereon of the same general appearance as the capsule used by your orator as also appears on said bottle.

Your orator further shows that the water contained in the bottles of said defendant is of an inferior quality to that sold by your orator and calculated to bring your orator's product into discredit.

Your orator charges that the use by said defendant of said bottle, label, the collocation of words printed on said label, and the capsule of tinfoil on said bottle constitutes an infraction and infringement of your orator's rights and that the use of said bottle, label, collocation of words printed on said label, and said capsule are all and singular unlawful and are all and singular calculated to mislead the public and to cause the defendant's goods to be mistaken in the market and to be sold as and for your orator's goods, hereinbefore described, to the great loss and injury to your orator and to the destruction of its business.

Your orator further says that it cannot with certainty
399 state the exact amount of profits diverted by the said defendant, nor cannot correctly estimate the amount of damage and injury sustained by it by reason of the fraudulent acts complained of, but believe the same to be of the full sum of five thousand dollars ($5,000), and so charges the fact to be, and prays that the said defendant may full and true disclosure make as to the same, and may be decreed to account therefor in full, and otherwise to respond in damages as may appear to be equitable.

Your orator further states that it has no adequate relief in the premises save in a court of equity where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendant, The International Medicinal Mineral Water Company, may answer the premises, but not under oath (answer under oath being hereby expressly waived), and that the said defendant may be enjoined and restrained, as well preliminarily and provisionally as perpetually, from making use of said bottle, as now used by said defendant, and from making use of said label like that forming "defendant's label" and from making use of a label of the same colors and arrangement as is used by said complainant in said "complainant's label" or any such resemblances thereto as are calculated to deceive, from using the collocation of words, shown on said defendant's label, from using said capsule of tinfoil as is now used on the bottle of said defendant, and from selling said water now sold by said defendant, representing the same to be a water from a spring in Hungary, and otherwise forever enjoining all the fraudulent acts complained of, and prohibiting the use by the defendant of any bottle substantially like that of your orator, which is hereinbefore described, and otherwise preventing the use of names, marks, bands, wrappers and forms of package or

bottle in imitation of that of your orator hereinbefore described. That said defendant may be decreed to account with and to pay over to your orator all the gains, profits, savings and advan-
400 tages of every description diverted from your orator, or made by the use of the said simulated bottle, label, collocation of words on said label, and said capsule of tinfoil, together with all damages resulting to your orator therefrom. That your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience and as to your honors shall seem meet.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendant, The International Medicinal Mineral Water Company, commanding it by a certain day and under a certain penalty, to be and appear in this honorable court and to stand to and abide by such order and decree as may be made against it.

And also the writ of injunction, as well provisional and preliminary as perpetual, issuing out of and under the seal of this honorable court, enjoining and restraining the said defendant, The International Medicinal Mineral Water Company, its officers, agents, attorneys, clerks, servants, and workmen, and claiming through or under them, and each and every of them, as is heretofore in that behalf prayed.

And your orator will ever pray.

EISNER & MENDELSON COMPANY,
By ELI J. AUGUST, *Its Agent.*

FELSENTHAL, D'ANCONA & RINGER,
Sol'rs and of Counsel for Compl't.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Eli J. August, being duly sworn, deposes and says: That he is the agent in this behalf of the Eisner & Mendelson Company, the complainant in the above bill. That he has read the foregoing bill and knows the contents thereof and that the same is true, except as to those matters stated on information and belief, and as to
401 such matters he believes it to be true.

ELI J. AUGUST.

Subscribed and sworn to before me this 12th day of August, A. D. 1892.

JACOB RINGER,
[SEAL.] *Notary Public, Cook County, Illinois.*

(Here follows Complainant's Wrapper "A" not copied.)

(Endorsed:) Filed Oct. 12, 1892. S. W. Burnham, clerk.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division*, } ss:

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the bill of complaint in said court on the 12th day of October, A. D. 1897, in the cause wherein Eisner & Mendelson Company are the complainants and International Medicinal Mineral Water Company are the defendants, as the same appears from the original thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 18th day of October, A. D. 1897.

[SEAL.] S. W. BURNHAM, *Clerk*.

402 COMPLAINANT'S EXHIBIT HUNYADI MATYAS DECISION OF 1894. March 2, 1898. J. A. S., Ex'r.

Translated from Hungarian.

Copy. Budapest chamber of commerce and industry. No. 1239/1894. To Mr. Andor Saxlehner, Budapest. In accordance with the rescript of his excellency the minister of commerce, No. 6584 dated 26th November of this year, we have the honour to inform you that on the trade-mark complaint raised by you as attorney of Mrs. Emily Pelekán, widow of Andreas Saxlehner, against the firm Mattoni and Wille, the minister decided as follows: I order to be cancelled the trade-marks registered with the Budapest chamber of commerce and industry on the 29th August, 1887, sub Nos. 1579, 1580, 1581, 1582 and 1583, further on the 29th April, 1889, sub Nos. 1892 and 1893, because according to the opinion of three experts consulted by the chamber, such trade-marks are similar in composition, design and colour and also for general impression to the trade-marks previously registered for the firm Saxlehner, and have been found to be imitations of same and apt to mislead the public. The alleged imitations committed by the not registered trade-marks "Erzsebet" and two kinds of "Hunyadi Matyas," finally by three kinds of capsule trade-marks, as enumerated in the petition of the complaining firm Andreas Saxlehner, are to be judged as trade-mark usurpations and as such come, in virtue of § 26 of the II law of the year 1890, under the competence of the royal courts of justice. In this connection, whilst returning you herewith the enclosures of your petition, we have the honour to inform you that the registry office of our chamber has cancelled from the registers the trade marks Nos. 1579, 1580, 1581, 1582 and 1583 registered with our chamber on Aug. 29th, 1887, and Nos. 1892 and 1893 registered on April 29th, 1889, for the Budapest
403 firm Mattoni and Wille. Budapest, 31st March, 1894. Budapest chamber of commerce and industry. Láneczy M. P. president, Peter Fritz M. P. secretary (L. S.) Stamp one florin. Ad.

No. 36955/ min. of comm. I hereby legalize the signatures of Le Láńczy and Peter Fritz president and secretary respectively of th Budapest chamber of commerce and industry, as well as the seal o the chamber. Budapest, 6th June, 1894. For the minister: Reisi M. P. secretary of state (L. S.) No. 611/1897. Stamp 50 kr. certify that this copy is exactly identical with the copy bearing stamp for one florin, produced by the Budapest firm Andreas Sax lehner. Given at Budapest, this twelfth (12) of March, one thousan eight hundred ninety-seven. Legalisation 30 kr., stamp 50 kr., tota 80 kr. Dr. Albert Edmund Hajós, substitute of Mr. Albert Gaszner royal notary public at Budapest, as per decree No. 246/1896 of th Budapest chamber of royal notaries public (L. S.) No. 1675/ pres 1897. The signature and official seal of Dr. Albert Edmund Hajós as substitute of Albert Gaszner Budapest royal notary public i hereby legalized according to § 67 of the XXXV law of the yea 1874. Budapest, 27th March, 1897. Dr. Francis Horvath, presiden (L. S.) No. 19282/ Min. of just. 1897. The signature and officia seal of the president of the Budapest royal tribunal is hereby legal ized. Budapest, 30th March, 1897. From the royal Hungarian ministry of justice. Dr. Albert Alexy, ministerial councillor (L. S. Stamp 50 kr. No. 122/1897.

I the undersigned sworn interpreter do hereby certify that th foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest, the 30th April, 1897.

IVAN BOSANYI, LL. D.,
[SEAL.] *Sworn Interpreter.*

404 COMPLAINANT'S EXHIBIT HUNYADI MATYAS DECISION OF 1896. March 2, 1898. J. A. S., Ex'r.

Royal Hungarian minister of commerce, $\frac{\text{No. } 43027.}{1896.}$

Andor Saxlehner, Esq., as attorney of Mrs. Emily Pelikan, widow of Andreas Saxlehner, proprietor of the firm Andreas Saxlehner.

BUDAPEST, VI. *Andrassy-ut* 3.

Upon the complaint raised by Andor Saxlehner of Budapest a representative of Mrs. Emily Pelikán, widow of Andreas Saxlehne proprietor of the Budapest firm "Andreas Saxlehner" against th Budapest registered firm "Mattoni and Wille" with a view of can celling certain trade-marks, and having consulted in this matte the Budapest chamber of commerce and industry and also th senate of trade-marks, I hereby order the cancelling of the followin trade marks registered with the Budapest chamber of commerce an industry, to wit:

1. The illustrated trade-mark called "Hunyady Mátyás" registere on the 9th of April 1894 sub No. 2350 for the defendants' firm.

2. The illustrated trade-mark called "Hunyady Mátyás" registere the 20th of April 1894 sub No. 2497 for the defendants' firm.

3. The illustrated trade-mark called "Hunyady Mátyas" registered on the 20th of April 1894 sub No. 2498 for the defendants' firm.

4. The illustrated trade-mark called "Hunyady Mátyás" registered on the 26th of April 1896 sub No. 2508 for the defendants' firm.

405 5. The illustrated trade-mark called "Hunyady Mátyás" registered on the 24th of July, 1895 sub No. 3303 for the defendants' firm.

6. The verbal trade-mark called "Hunyady Mátyas" registered on the 2nd of August 1895 sub No. 3367 for the defendants' firm.

The defendants are condemned to pay to the plaintiff according to § 9 of the XLI law of the year 1895 the sum of 35 florins being the ready money expenses caused by the action and the legal representation.

Motives.

It is a proved fact that the late Andreas Saxlehner who was the founder of the Budapest firm Andreas Saxlehner has for more than 30 years denominated all the bitter waters he used to sell by the names "Hunyadi János" and "Hunyadi" respectively and also that his universal legal successor his widow *née* Emily Pelikán has always carried and is still carrying on the business with that characterizing denomination.

It is another stated fact that the denominations "Hunyadi János" and "Hunyadi" respectively given to the bitter water introduced by Andreas Saxlehner were generally known in the country already in the year 1863 and shortly afterwards also abroad. That activity which Andreas Saxlehner displayed both in the country and abroad in order to make known the individualizing and distinguishing names of "Hunyadi János" and "Hunyadi" given to the bitter waters which he brought into trade had the consequence that as we know by experience is under similar circumstances generally the case, the business itself was called by that name, that is to say that the business itself became known under that denomination.

Thirdly it is a proved fact that Andreas Saxlehner was the first to use the denomination "Hunyadi János" and "Hunyadi"
406 for the bitter waters drawn from his Buda springs, while on the other side it is notorious that the bitter waters coming from the Buda springs were already an object of trade before Andreas Saxlehner started his business.

Finally from the register of trade-marks kept by the Budapest chamber of commerce and industry as well as from the official certificates issued by this chamber it appears that Andreas Saxlehner was the first who had registered a trade-mark on bitter water, the characteristic parts of which were formed by the words "Hunyadi János," the division into a threefold field, and the application of the portrait.

Considering that the firm of Andreas Saxlehner for a period of more than thirty years never ceased to employ the name of "Hunyadi János" in its business activity extending both in the home

and the foreign trade, this name became a designation of its business (article 10 of the IInd law of 1890).

A certain name is the more closely connected with the business, the greater the endeavours and expenses were which the proprietor of the business employed in creating and propagating the public notion that the chosen denomination represents his business and its products. From this consistent commercial activity requiring considerable sacrifices, results the appropriation of the name which is protected by the law. Whereas the firm of Andreas Saxlehner has with purposeful activity and considerabls expenses connected the name in question with its business, the exclusive use of this name for the purpose of denominating bitter water or mineral water and similar products is an exclusive and individual right of the firm of Andreas Saxlehner, against the infringement of which protection is granted by the law upon trade-marks (paragraphs 10 and 24 of the IInd law of the year 1890 and paragraph 9 of the XLI law of the year 1895).

Therefore in judging the object of the present complaint it had to be taken as a departing point that the words "Hunyadi
407 János" and "Hunyadi" ever since a time which in point of view of trade may be called very considerable, have served and in fact even actually do serve as a designation of Andreas Saxlehner's business and of the products of such business; on the other side it can be fairly stated by the report made by the said chamber as well as by the matters of fact well known to this ministry that the above commercial denomination has become common all over the world and has passed into the cognizance of the international public in the most extensive sense of the word.

In foreign countries either both of these characterizing words or only one of them became a term for the designation of Andreas Saxlehner's business, that is to say of the products of that business, according to the peculiarities of the languages of the different nations.

The consuming public living in Germany, England and in the United States of North America, etc., know the business of the plaintiff and the products coming from it under the denomination of "Hunyadi János" or in an abbreviated form "Hunyadi" whereas the French, Italians, Spaniards and Roman nations in general have become used to the word "János" to such an extent that they ask for Saxlehner's bitter water merely under the name of "Hunyadi János water," "Hunyadi wasser," "Hunyadi water" "Eau de János," "Acqua di János," without mentioning the firm at all.

It is therefore stated in the first place that the words "Hunyadi János" or, abbreviated, the words "Hunyadi" or "Janos" form the commercial denomination of the business and of the business products of the firm of Andreas Saxlehner, and in the second place that the trade-marks registered by the firm Andreas Saxlehner with the Budapest chamber of commerce and industry on the 12th of December, 1873, under No. 10 and several times afterwards were characterized by these words, and also that the words "Hunyadi János,"

"Hunyadi" and "János" were likewise registered on behalf
408 of the firm of Andreas Saxlehner in the Register of Trade-marks of the Budapest chamber of commerce and industry as verbal marks fit to be registered in the sense of para. 1 of the XLI law of the year 1895 and this previously to any other firm producing bitter water.

The individual special right of the firm Andreas Saxlehner is therefore equally based upon the commercial denomination introduced by it as upon the trade-mark rights it has acquired. Earlier than this firm no one else has ever denominated bitter water or other mineral water by the word "Hunyadi János," "Hunyadi" or "János" nor has any one else acquired by registration either for bitter water products or for the words in question any trade-mark protection, so that the plaintiff's firm is entitled to the priority for the exclusive use of these words as a commercial denomination (para. 10 of the II law of the year 1890) as well as a trade-mark (para. 1 of the XLI law of the year 1895).

The objection raised by the defendants against the right of exclusive use of these words which the plaintiff's firm appropriated in a legitimate and legal manner on the ground that it was permitted by decree No. 8317 of the year 1873 of the ministry for agriculture, industry and commerce to sell the bitter water coming from the defendant's spring under the name of "Hunyady Mátyás," could not be taken into consideration, because in judging trade-mark cases only the dispositions of the II law of the year 1890 and of the XLI law of the year 1895 are of determining effect, the legal application of which laws, cannot be influenced by a decision of the government brought in a concrete case on the basis of the VIII law of the year 1872 on industry since repealed, so much the less as the decision in question did not consider the case on the basis of the rules then prevailing about protecting trade-marks, but expressly according to the dispositions of the law on industry then in force. There is, therefore, absolutely no connection between that decision and the case now under consideration.

409 On all these grounds the verbal trade-mark called "Hunyadi Mátyás" registered with a Budapest chamber of commerce and industry on the 2nd of August 1895 sub No. 3367 for the defendant's firm had to be cancelled, since in respect of the name "Hunyadi" the plaintiff had by his trade-mark registered on the 2nd of August 1895 sub No. 3330 acquired priority, and further, because the application of this word for designating merchandise prejudices the right of the plaintiff acquired in virtue of § 10 of the II law of the year 1890, and finally because the use of the name Hunyadi even combined with another name or other names for designating merchandise is apt to mislead the buying public.

The illustrated trade-marks Nos. 2350, 2497, 2498 and 2508 registered for the defendant on the 9th of April 1894, 20th April 1894 and 26th April 1894 respectively and more closely specified in the dispositive part of the present decision had also to be cancelled because by their threefold division and principally by the application of the name "Hunyady" they have a misleading effect and are

prejudicial to the rights of plaintiff required in virtue of § 10 of II law of the year 1890.

Finally the illustrated trade-mark called "Hunyady Mátyás" registered on July 24th 1895 sub No. 3303 for the defendants had also to be cancelled because by employing the name "Hunyadi" it is apt to mislead the consuming public and it is prejudicial to the rights of the plaintiff acquired in virtue of §§ 3 and 10 of the II law of the year 1890.

For all these reasons all of the trade-marks of the defendants which were objected to had to be cancelled.

The costs were adjudged in favor of the plaintiff according to the amount of net expenses actually incurred.

Budapest, 7th October, 1896.

DANIEL.

410 COMPLAINANT'S EXHIBIT DEFENDANT'S GUARANTY CIRCULAR. March 3, 1898. J. A. S., Ex'r.

Eisner & Mendelson Co.

NEW YORK *Nov.* 20, 1896.

GENTLEMEN: In reply to the numerous inquiries which we have received from the trade in reference to a "caution" circular issued by Briesen & Knauth, attorneys for Andreas Saxlehner, we beg to say that the Hunyadi Matyas water imported by us, has been sold in the markets of the world, in competition with the Hunyadi Janos water and other Hunyadi waters for the last twenty-three years and is genuine.

We will protect the trade in selling the same, and remain

Yours very truly,

EISNER & MENDELSON CO.,
Per MORITZ EISNER.

COMPLAINANT'S EXHIBIT MARKUS PETITION. March 3, 1898. John A. Shields, Ex'r.

Translated from Hungarian.

(Copy.) To the administrative council of the royal free city Buda, a petition by Ignatius Markus, lessee of the saline spring at the house No. 915 at Buda (of No. 43 Soroksári-uteza, Pest) notifying the discovery of a bitter-water spring at the house No. 915 leased by him, on the Lágymányos, Buda, and praying for a license to work same under the name herein mentioned.—Honorable town council: I the undersigned, had a well dug on the land prop-
411 erty of Mr. Alexander Rèsö Ensel, in the immediate vicinity of the house No. 915 at the Lágymányos, Buda, and had the water obtained therefrom examined according to the certificate A, enclosed herewith, and its chemical constituents having been certified to as of an excellent bitter water which will have an efficient action on the human organism, I therefore intend using that well as

an eminent bitter-water spring and make a trade therewith. I have the honour to notify this to the honourable town council with a view to obtain the necessary trade license, and I will add that I wish to apply to this bitter-water spring chemically examined the name of "Hunyadi Mátyás" and bring its water into trade under such name. Wherefore, lest the owner of the "Hunyadi Janos" already in use at the saline springs should be able to raise the slightest objection to such denomination, I request that he be informed of the license and of the denomination. I remain the honorable town council's obedient servant Ignatius Márkus M. P. No. $\frac{11250}{1872}$. It is ordered to be referred to Dr. Francis Freureisz, town physician-in-chief, to report hereon. Buda, 31st July, 1872, Alker M. P.—Stamp one florin. I hereby certify that the present copy is entirely identical with the original, bearing a 50 kr. stamp, kept at the archives of the metropolis, Budapest, sub No. $\frac{2233}{1872}$ Buda arch., Budapest, 26th Sept., 1893, Dr. Toldy, M. P. chief keeper of archives (L. S.)—50 kr. stamp No. $\frac{6602}{1897}$. I certify that this copy is exactly identical with the copy bearing a stamp for one florin, produced by the Budapest firm Andreas Saxlehner. Given at Budapest 12th March, 1897, Dr. Albert Edmund Hajós, substitute of Mr. Albert Gászner, royal notary public at Budapest, as per decree No. 246 / 1896 of the Budapest chamber of notaries public (L. S.) legalization 30 kr., stamp 50 kr., total 80 kr.—No. $\frac{1675}{\text{Pres. } 1897}$. The signature and seal of Dr. Albert Edmund Hajós as substitute of Albert Gaszner, Budapest notary public is hereby legalized according to § 67 of
412 the XXXV law of the year 1874, Budapest, 27th March, 1897, Dr. Francis Horváth, president (L. S.) No. $\frac{15282}{\text{Minst. of Just. } 1897}$. The signature and official seal of the president of the Budapest royal tribunal is hereby legalized, Budapest 30th March, 1897. From the royal Hungarian ministry of justice Dr. Albert Alexy, ministerial councillor (L. S.).

50 kr. stamp.

No. 11897. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text. Budapest the 27th April 1897.

[SEAL.] IVAN BOSANYI, LL. D.

COMPLAINANT'S EXHIBIT. TOWN PHYSICIAN'S REPORT. March 3, 1898. John A. Shields, Ex'r.

Translated from Hungarian.

(Legalized copy.) Registered sub. No. $\frac{11948}{872}$ the report of Dr. Francis Freureisz, chief physician to the metropolis Buda. Honourable council: A petition by Mr. Ignatius Márkus respecting the discovery of a bitter-water spring having been referred to the undersigned by decree No. 11250 of this honourable council dated 31st July of this year to be reported on, I have the honour to return such petition with the following opinion of mine that considering the bitter water discovered by the petitioning Mr. Ignatius Márkus at Kelenföld and

by him intended to be named "Hunyady Mátyás" possesses according to the chemical opinion of the chemical adviser to the town of Pest, John Molnár, the same medicinal constituents as the other similar bitter waters of Kelenföld, it seems to be in the interest of suffering mankind to bring this regular, well-constituted bitter water into commerce. Having given this my respectful opinion on the petition of Mr. Ignatius Márkus praying for permission to
413 open the medicinal spring at Kelenföld under the name of "Hunyady Mátyás" Mr. Saxlehner, the owner of another bitter-water spring the "Hunyady János" situated also at Kelenföld, protests against the opening of the former spring by the first-named petitioner and prays that Ignatius Márkus should not be permitted to open the spring under the name "Hunyady," because thereby the commerce of his (Saxlehner's) spring, already well known and much sought after abroad, might and certainly would be diminished. Honourable council: Although it is beyond my competence to give an opinion on the petition of Mr. Saxlehner, yet I would recommend that the honourable council pay attention to the objections raised by Mr. Saxlehner against the intention of Ignatius Márkus. I remain, with respect, the honourable council's obedient servant, Dr. Frances Freureisz, M. P. chief physician (L. S.) stamp one florin. I hereby certify that the present copy is entirely identical with the original kept at the archives of the metropolis Budapest sub No. $\frac{2}{1}\frac{3}{8}\frac{3}{9}\frac{3}{7}$ Buda, arch. Budapest, 7th September 1893 Louis Schmall, M. P. underkeeper of archives (L. S.) Stamp 50 kr. No. 596/1897. I certify that this copy is exactly identical with the copy bearing a stamp for one florin, produced by the Budapest firm Andreas Saxlehner. Given at Budapest, 12th March, 1897, Dr. Albert Edmund Hajós, substitute of Mr. Albert Gászner, royal notary public at Budapest, as per decree No. 246/1896 of the Budapest chamber of notaries public (L. S.) legalization 30 kr., stamp 50 kr., total 80 kr., No. $\frac{1675}{\text{Pres. 1897}}$ The signature and seal of Dr. Albert Edmund Hajós as substitute of Albert Gászner, Budapest notary public is hereby legalized according to § 67 of the XXXV law of the year 1874. Budapest, 27th March, 1897, Dr. Francis Horváth, president (L. S.) No. $\frac{19282}{\text{Minst. of Just. 1897.}}$ The signature and official seal of the president of the Budapest royal tribunal is hereby legalized. Buda-
414 pest, 30th March, 1897. From the royal Hungarian ministry of justice, Dr. Albert Alexy, ministerial councillor (L. S.)

Stamp,
50 kr.
No. 118/97.

I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hitherto-annexed Hungarian text.

Budapest the 27th April, 1897.

IVAN BOSANYI,
Sworn Interpreter.

[SEAL.]

COMPLAINANT'S EXHIBIT TOWN COUNCIL'S DECISION OF 1872. March 3, 1898. J. A. S., Ex'r.

Translated from Hungarian.

Legalized copy. No. $\frac{11948}{872}$. The council of the metropolis Buda on the bitter water spring of Mr. Ignatius Markus. Decided. As the water from the bitter-water spring discovered by the petitioning Ignatius Markus at the house No. 915 at Kelenföld possesses, according to the report of the chief physician, dated July 8th of this year, the same constituting parts and medicinal power as the other bitter-water springs already existing in that neighborhood, and as this council believes to act in the interest of suffering mankind and of free competition by facilitating and furthering the commerce of this water in as great a measure as possible, therefore the permission for the sale of this water is unconditionally granted to the petitioner. As regards, however, the request to be allowed to name this spring "Hunyady Matyas" bitter-water spring and to bring its water into commerce under this name, this must be denied on the ground of the petition and protest by Mr. Andreas Saxlehner, local
415 bitter-water spring owner, presented sub No. 11922 this year, because Andreas Saxlehner having for many years traded with such bitter water under the denomination "Hunyady Janos" and his water having become known not only at home, but also and more especially abroad solely under the name "Hunyady" and all orders being made under this name; the granting of the denomination "Hunyady Matyas" to another spring would very likely, nay certainly lead both between the owners of the two springs and among the consuming public to unpleasant misunderstandings which it is the duty of the authorities to avoid and even to prevent. And further the fact that petitioner, notwithstanding the many designations at his disposal seeks to apply the name "Hunyady" to his spring, undoubtedly shows the not very noble intention on his part to avail himself of the great diffusion and good renown enjoyed by the Saxlehner Hunyady bitter spring both at home and abroad, which, however, cannot be tolerated by the authorities, and in the present case all the less as it is a well-known fact that Mr. Saxlehner was able to secure this good renown to his spring only through many years' labour and at considerable expense. For all these reasons the requested denomination "Hunyady Matyas" is denied to the petitioning Ignatius Markus, and he is prohibited under the penalty of a fine and eventually the inhibition of his business from using such denomination, and he is called upon to petition this counsel for permission to use any other denomination freely chosen by him. Buda, 16th August, 1872. Alker M. P. councillor. I hereby certify that the present copy is absolutely identical with the original kept at the archives of the metropolis Budapest (sub No. $\frac{2232}{872}$ Buda arch.). Budapest 7th Sept., 1893. Louis Schmall, M. P. underkeeper of archives (L. S.) Stamp 50 kr. No. 598/1897 I certify that this copy is exactly identical with the

copy bearing a stamp for one florin produced by the Budapest firm Andreas Saxlehner. Given at Budapest 12th March,
416 1897, Dr. Albert Edmund Hajos, substitute of Mr. Albert Gaszner, royal notary public at Budapest, as per decree No. 246/1896 of the Budapest chamber of notaries public (L. S.) legalization 30 kr. stamp 50 kr. total 80 kr. No. $\frac{1675}{\text{Pres. } 1897}$. The signature and seal of Dr. Albert Edmund Hajos as substitute of Albert Gaszner Budapest, notary public, is hereby legalized according to sec. 67 of the XXXV law of the year 1874. Budapest, 27th March, 1897. Dr. Francis Horvath, president (L. S.) No. $\frac{19282}{\text{Min. of Just., 1897}}$ The signature and official seal of the president of the Budapest royal tribunal is hereby legalised. Budapest, 30th March, 1897, from the royal Hungarian ministry of justice. Dr. Albert Alexy, ministerial councillor (L. S.).

COMPLAINANT'S EXHIBIT DECISION OF MINISTER OF AGRICULTURE. March 3, 1898. J. A. S., Ex'r.

Translated from Hungarian.

Copy. Royal Hungarian ministry of agriculture, industry and commerce. No. 8317. Budapest, June 9th, 1873. To the town council of the royal free metropolis Buda, at Buda. In returning the enclosures of the petition addressed to the minister of the interior, but by him transmitted to me for competent decision, with regard to the complaint between Andreas Saxlehner and Ignatius Markus touching the denomination of a bitter-water spring discovered by the latter with the name "Hunyady Matyas medicinal spring" I hereby inform the metropolitan council that I have to reverse that part of the council's decision No. 11948 of August 16th of last year which denies Ignatius Markus the permission to name the bitter-water spring discovered at 915, Kelenföld, "Hunyady Matyas" and sell its water under such denomination. Such decision had to be reversed because according to the VIII law
417 of the year 1872 the regular notification of a trade cannot be made dependent on the use or the prohibition of a name or a trade-mark—even if this be a proper name—and further because the name "Hunyady Janos" used for many years by Andreas Saxlehner for the denomination of his own bitter-water and medicinal spring, and the name "Hunyady Matyas" intended to be used by Ignatius Markus cannot be considered as trade-marks, because the rule existing for the protection of trade-marks and samples, as mentioned in § 17 of the customs and commercial treaty embodied in the XVI law of the year 1867 is applicable to such trade-marks and samples only as have been secured by having been duly deposited and registered with the competent chamber of industry, which in the present case not only does not appear to have been done—at least there is no mention hereof in the documents—but properly speaking it could not be done at all, since "Hunyadi Janos" and "Hunyadi Matyas" represent two quite clearly different names, which may stand without any infringement to each other. From a

sanitary point of view as the chemical certificate and the opinion of the chief physician testify to similar constituents in Ignatius Markus's bitter water as those contained in the other Kelenföld bitter waters, it cannot have an effect different from that of Andreas Saxlehner's bitter water and thus the use of the former in illnesses, where Saxlehner's is prescribed with good result, cannot have a harmful effect and *vice versa*. In the light of the foregoing the arguments adduced in motivation of the refusal had to be put aside as quite untenable suppositions and the permission is to be granted to Ignatius Markus to the title by him wished to be adopted, namely, "Hunyady Matyas medicinal spring," dismissing the unjustified protest raised thereto by Andreas Saxlehner, which is to be notified to the parties interested, returning to them at the same time their papers. Zichy M. P. (Stamp one florin.) I hereby certify that the present copy is ab-
418 solutely identical with the original kept sub No. 2232/872 Buda archive at the archives of the metropolis, Budapest, 7th September, 1893. Louis Schmall, M. P. underkeeper of archives (L. S.) Stamp 50 kr. No. 600/1897. I certify that this copy is exactly identical with the copy bearing a stamp for one florin, produced by the Budapest firm—Andreas Saxlehner. Given at Budapest, 12th March, 1897. Dr. Albert Edmund Hajós, substitute of Mr. Albert Gászner, royal notary public at Budapest, as per decree No. 246/1896 of the Budapest chamber of notaries public (L. S.) Legalization 30 kr. stamp 50 kr. total 80 kr. No. 1675/pres. 1897. The signature and seal of Dr. Albert Edmund Hajós as substitute of Albert Gasyner Budapest notary public is hereby legalized according to § 67 of the XXXV law of the year 1874. Budapest 27th March, 1897. Dr. Francis Horvath, president (L. S.) No. 19382/min. of just. 1897. The signature and official seal of the president of the Budapest royal tribunal is hereby legalized. Budapest 30th March 1897. From the royal Hungarian ministry of justice, Dr. Albert Alexy, ministerial councilor (L. S.)

I, the undersigned, sworn interpreter, do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 27th April 1897.

IVAN BOSANYI,
[SEAL.] *Sworn Interpreter.*

COMPLAINANT'S EXHIBIT MAYO'S STATEMENT.

Deutsch Amerikanische Apotheker Zeitung (German-American Apothecaries Gazette).

Page 4.

Published monthly at 104 John street, New York; circu-
419 lates exclusively among German-American drug trade—circulation about 2,500 copies. Eisner & Mendelson published in it a page advertisement for seventeen consecutive issues,

beginning with the issue for May, 1890, and concluding with the issue for September, 1891.

They probably paid not more than $170 00
They could not have paid more than 425 00

Page 15.

Mineral Waters.—Formerly published in New York city. Later the name was changed to Journal of Balneology; circulates among physicians exclusively. The paper was not popular, and has been discontinued for some years.

Eisner and Mendelson claim that they published in it a page in the issue of March, 1890, which was sent out to 20,000 physicians. They also claim that they published pages from time to time. The printers who last printed the paper, Stettiner, Lambert & Co., Reade street, New York city, had no file of this paper, but said that it could be seen at Eisner & Mendelson's, who were its owners.

If they paid anything, they probably paid not more than.. $20 00
They could not have paid more than 35 00

Page 17.

San Francisco's Daily Report.—Daily evening paper published in San Francisco, Cal., circulation about 20,000, among the general public.

There was inserted under another name than Eisner & Mendelson the advertisement (see page 17 of Book of Exhibits) in the issue of November 22, 1892, two columns wide and nine and three-quarter inches deep, amounting to 273 lines.

They probably paid not more than $45 00
They could not have paid more than 54 60

420 Journal of Balneology.—Circulated among physicians exclusively, has been discontinued because of unpopularity. Eisner & Mendelson claim to have inserted a page advertisement from time to time during 1890. Only one page is shown.

One page should have cost not more than $20 00
They could not have paid more than 35 00
If they printed in every issue of the year, they may have paid at most 360 00

Reading notices.—Such as are inserted on pages 16, 17 and 18 of the Book of Exhibits, cost the advertiser nothing, or should cost nothing. The papers cheerfully insert these free of charge.

Grocers' Monthly Review.—Published monthly by E. C. Hazard & Co., wholesale grocers, at Hudson and North Moore streets, New York. Circulates principally among their customers in the retail grocery trade. Claims a circulation of about 3,000. It is customary for those introducing new goods through the wholesale grocers to advertise in any paper which this wholesaler may publish.

Eisner & Mendelson advertised Hunyadi waters in this publica-

tion, as follows: One-quarter page in 1891, October, November and December; in 1892, January, February, March, April, May and June; in 1893, April, May, June, July, August, September, October, November and December; in 1894, January and February; in 1896, April, May, June, July, August, September, October, November and December; in 1897, January, February and March.

The probable total cost was..... $150 00
The total maximum cost was 275 00

Oil, Paint and Drug Reporter.—Published in New York city, circulated among importers, exporters and wholesale dealers in petroleum, animal and fish oils, drugs, heavy chemicals, paints, varnishes, varnish materials, etc. Circulation about 3,600.

421 Eisner & Mendelson, on September 26, 1892, had a page advertisement, of which one-half was devoted to quotation of prices on Arpad, Bela, Lazlo and Matyas.

They probably paid for this half page $20
They could not have paid more than 25

American Druggist.—Published monthly by Wm. Wood & Co., New York. Circulated solely among the retail drug trade of the United States. Circulation at that time about 10,000.

Eisner & Mendelson inserted a page advertisement in this paper in July, 1890, and in August, 1890.

For this they paid..... .... $50
They could not have paid more than..... 50

Druggists' Circular.—Published monthly at 100 William street, formerly 72 William street, New York. Circulates wholly among druggists and physicians. The publishers claimed a regular circulation of 12,000 copies per issue. Latterly they claim to have occasionally sent out several thousand sample copies.

Eisner & Mendelson ran an advertisement from time to time in this paper, sometimes using the entire space and sometimes using a portion of the space only for advertising Hunyadi waters. I find that the space used by them for advertising Hunyadi waters is as follows:

1890.—July, 1 page; August, 1 page; September, 1 page.
1892.—June, ⅛ page; July, ⅛ page; August, ⅛ page; September, ¼ page; October, ¼ page; November, ¼ page; December, 1 page.
1893.—January, 1 page; February, 1 page.
1894.—January, ½ page.
1895.—January, 1 page; February, 1 page; March, 1 page; April, 1 page.
422 1896.—July, 1 page; August, 1 page; September, 1 page; October, 1 page.

1897.—January, 1 page; February, 1 page; April, 1 page; June, 1 page.

This makes a total of 18⅔ pages used in this paper.

They probably paid for this..... $1,075 00
They could not have paid more than..... 1,512 75

Pharmaceutische Rundschau (Pharmaceutical Review).—Published at that time in New York city. Circulated exclusively among German-speaking druggists. Circulation about 2,000 to 2,500.

Eisner & Mendelson claim to have advertised in it for about a year, beginning in 1891. I could not find a file of this paper with the advertisement in it. If they did use a whole page for a whole year—

The probable total cost was..... $150
They could not have paid more than..... 200

Summary of Probable Circulation and Cost of Advertising Cited.

	Probable circulation.	Probable.	Highest possible.
Deutsch Amerikanische Apotheker Zeitung	2,500	$170	$425 00
Mineral Water	20,000	20	35 00
San Francisco Daily Report	20,000	45	54 60
Journal of Balneology (same as Mineral Waters)		20	35 00
Grocers' Monthly Review	3,000	150	275 00
Oil, Paint & Drug Reporter	3,600	20	25 00
American Druggist	10,000	50	50 00
Druggists' Circular	12,500	1,075	1,512 75
Pharmaceutische Rundschau	2,500	150	200 00
	74,100	1,700	2,412 35

The probable combined circulation of all the papers cited is 74,100. The highest possible claim for their combined circulation would be 100,000. Since nearly all of these papers went to the drug trade, there was much duplication of circulation, and I should say there were not more than 60,000 different people reached by all the advertisements.

423

The highest possible cost for the advertising cited is $2,412.35. This is what the advertising would cost if the full card rate was paid in each case. They should not have paid more and probably did not pay more for the advertising than $1,700.

Complainant's Exhibit Markus-Ensel.

Translated from Hungarian.

(Copy.) Budapest chamber of commerce and industry. No. 3819/1893 (stamp one florin). Certificate. The undersigned chamber officially certifies hereby that there has not been registered either

for Ignatius Markus or for Alexander Résë Ensel with this chamber since 1868 any trade-mark for the protection of mineral water, and especially for bitter water. Budapest, 23d Sept., 1893. Budapest chamber of commerce and industry. Lanczy M. P. president. Peter Fritz M. P. secretary (L. S.). Stamp 50 kr. No. 590/1897.
(Duly authenticated.)

COMPLAINANT'S EXHIBIT ENSEL.

Translated from Hungarian.

(Copy.) No. 4165/1897. I mun. distr. official certificate (stamp one florin). This municipality district officially testifies hereby at the instance of Mrs. Emily Pelikán, widow of Andreas Saxlehner, that according to the documents of the former Buda trade
424 authority as well as the trade registers of this municipality district, Alexander Résë Ensel has never, within the epoch from 1872 to 1877 applied for, nor obtained a license for the production or sale of bitter water. Budapest 13th April, 1897. The I municipalit- district. (L. S.) Tozsa M. P. deputy chief. No. 1010/1897. Stamp 50 kr.
(Duly authenticated.)

COMPLAINANT'S EXHIBIT MARKUS.

Translated from Hungarian.

Copy from the original bearing a stamp for one florin. No 4166/97. Official certificate. This municipality district officially testifies hereby at the instance of Mrs. Emily Pelikan, widow of Andreas Saxlehner, that according to the documents of the former Buda trade authority as well as the trade registers of this municipality district, Ignatius Markus has never, within the epoch from 1872 to 1877 obtained a license for the production or sale of bitter water. Budapest, 14th April, 1897. The I. municipality district. Tozsa M. P. deputy chief (L. S.) Stamp 50 kr. No. 1009/1897.
(Duly authenticated.)

COMPLAINANT'S EXHIBIT ENSEL NO. 2.

Translated from Hungarian.

Copy. No. $\frac{16561/93}{\text{I. Mun. Distr.}}$ Certificate to the effect that since the formation of this municipality district Alexander Résö Ensel has neither applied for, nor obtained, a license for the production and
425 sale of bitter water from springs within the jurisdiction of this district. Budapest, 26th September, 1893. The I. municipality district: Osztoits M. P. Chief, Olhauser M. P. (L. S.) Stamp 50 kr. No. 593/1897.
(Duly authenticated.)

Complainant's Exhibit Ivanyi Contract.

Translated from German.

Copy. Contract of purchase and sale. I. Mr. Michael Ivanyi and his wife, Mrs. Rosalie Ivanyi, *née* Haselbach, sell the ground on the Lagymanos, registered sub No. $\frac{1033.5}{a}$ in the ground roll of Buda 3701 0. Z. 3. and No. $\frac{1033.5}{b}$ in the ground roll 6145, comprising about 6 jochs 193 square klafters and 1473 square klafters respectively together therefore about seven jochs sixty-six square klafters, along with the saline spring "Deak Ferencz" situated thereon, as well as the buildings on the same ground, to wit also the house No. 943 and the appurtenances more closely to be specified hereunder, free from burdens, to Mr. Henry Mattoni, the wife of same Mrs. Wilhelmina Mattoni, *née* Knoll, both of Karlsbad, further to Mr. Emil Wille and the wife of same Mrs. Theresa Wille *née* Schönborn, both of Vilma, for the total price of fl. 48,000 that is forty-eight thousand florins Austrian value. * * *

VIII. All bottles, cases, corks, capsules, labels, straw, nails, hoops servic-able in the working of the spring, as well as the stock of filled bottles will be handed over to and taken over by, purchasers at cost prices. On the other hand, not only all the fixtures, but also the filling apparatus, especially the corking and capsuling machines, and the reservoirs for cleansing the bottles will become, without separate compensation, the property of purchasers as part and
426 parcel of the object of sale. The exhibition diploma gained by the vendors for the bitter water from the spring in question at the Vienna Universal exhibition in 1873 has also, as pertaining to the property, been handed over by vendors to purchasers on the signature of this contract. * * * In faith of which the present contract was drawn up in two identical copies and signed by vendors as well as by Mr. Emil Wille, as per powers enclosed the attorney of the other purchasers, and also by two witnesses. Budapest, 8th November, 1876. Michael Ivanyi M. P. Rosalie Ivanyi *née* Haselbach M. P. Emil Wille M. P. also in the capacity of attorney for Mr. Henry Mattoni, Mrs. Wilhelmina Mattoni, *née* Knoll, and my wife Theresa Wille, *née* Schönborn. Before us: Joseph Siro, M. P. as witness, William Lalanczy M. P. as witness. Translated from Hungarian: Identical with the original bearing a stamp for 2 florins 75 kreuzers. Holies M. P. registrar (L. S.) Stamp one florin. I hereby certify that the present copy is entirely identical with the officially legalized copy made of the original, bearing a stamp for 2 florins 75 kreuzers and kept sub No. 2437/76 at the archives of the I–III Budapest district court as ground-roll authority, Budapest, 25th September, 1893, Ignatius Dobszay M. P. (L. S.) Stamp 50 kr. No. 594/1897.

(Duly authenticated.)

COMPLAINANT'S EXHIBIT HUNYADY MATYAS SPRINGS.

Translated from Hungarian.

Copy. $\frac{10683/93}{\text{I. Mun. Distr.}}$. Certificate to the effect that the bitter-water spring named "Hunyady Matyas" existing on the ground No. 10358 at Kelenföld since 1872 and commenced to be worked by the firm Mattoni and Wille in 1877 according to decision No. 427 $\frac{1138}{1877}$ is at present not in working, and that the firm Mattoni and Wille obtains the bitter water named "Hunyadi Matyas" from the well existing at No. $\frac{10335}{a}$ at Buda. Budapest, 26th September, 1893. The I. municipality district: Osztoits M. P. chief, Olhauser M. P. secretary (L. S.) Stamp 50 kr. 589/1897.

* * * * * * *

(Duly authenticated.)

COMPLAINANT'S EXHIBIT SCHERER LETTER. March 22, 1898.
J. A. S., Ex'r.

P. Scherer, sole agent for Bethesda mineral water; office, 19–21 North William street, entrance also 73 Park row, opposite Staatszeitung building.

Telephone call, 3533 Cortlandt.

NEW YORK, *August* 21*st*, 1896.

The Aesculap Water Co'y, Ltd., 51 Farringdon street, London, E. C., England.

DEAR SIRS: You are no doubt aware that Schweppe & Co. had for several years about 1,000 cases of Asculap water here and were unable to sell it. I undertook to sell the water and some time ago had the enclosed label printed and nearly worked off the entire lot. Customers here like the water and I wish to know if you will be willing to put the water on the market under the enclosed label if I can enter into an arrangement with you.

428 Please state your terms and prices either from the springs or f. o. b. steamer in Trieste.

Trusting to hear from you at an early date.

I remain,

Yours truly,

P. SCHERER.

COMPLAINANT'S EXHIBIT AESCULAP LETTER. March 22, 1898. J. A. S., Ex'r.

B⁶. 1896 S. No. 2144.

In the High Court of Justice, Chancery Division, Mr. Justice Kekewich.

SAXLEHNER
v.
THE APOLLINARIS CO'Y, LTD.

This is the exhibit marked B⁶ referred to in the affidavit of A. W. Burdett, sworn in this action this 19th day of October 1896
Before me—

CHARLES O. HUMPHREYS,
A Commissioner, &c.

LONDON, *September 9th*, 1896.

Mr. P. Scherer, 8 Barclay street, New York.

DEAR SIR: With reference to your letter of the 21st and ours of the 31st ult., we regret that prior to having the label printed bearing the words Hunyadi Aesculap you did not submit it to us for approval, as we never lend ourselves to the use of proprietary words or printed matter, which we consider rightly belongs to other spring-owners in Hungary and the improper use of the word Hunyadi by a limited company here and in Budapest by a recent decision
429 in the law courts in Budapest landed them in costs and a perpetual injunction against using the word Hunyadi for trade purposes.

We shall be pleased to supply you with Aesculap at the prices given below and on the following terms labelled with a similar label to the one used by you but of course without bearing the word Hunyadi.

In lots of 500 cases each 50 pints 25/– net.
In lots of 1,000 cases each do. do. 24/– net.
Delivered at Trieste or Fiume.
Terms. Banker's draft against bill of lading.

We beg to point out that we do not attempt to compete with other Hungarian springs. We spare no trouble or expense in our bottling, and you may rely upon the same excellence in our putting up of the water being maintained in the future.

We enclose our pamphlet and awaiting your reply
We are dear sir
Yours faithfully,

THE A. B. W. CO.
A. W. BURDETT,
General Manager.

P. S.—We shall be pleased in the event of your placing an order with us for say 500 cases at least to send you 10 or 12,000 of our

pamphlets. We are not prepared to allow anything for advertising, as our contract with Messrs. Schweppe & Co. was that they were to expend at least one dollar on each case in advertising, and we have quoted you the same prices and terms as those to Messrs. Schweppe & Co., Ltd.

COMPLAINANT'S EXHIBIT HUNYADY MATYAS III RESCRIPT.

Translated from Hungarian.

Copy. Royal Hungarian minister of commerce. No. 430 74129/VI. To the municipality of the Metropolis Budapest. In a petition addressed to me and which I herewith return together with enclosures for transmission to the sender, Mr. Gustav Kahn, the representative of Henry Mattoni, prays for permission to bring into commerce under the denomination "Hunyadi Matyas III" the bitter water from a well recently dug on his property No. 10335 at Kelenföld. I request this municipality to inform the petitioner that no government license is necessary in denominating bitter waters, for, as pointed out in the rescript of my predecessor to this municipality, dated July 9th, 1889, No. 28477, the naming of bitter waters, the same as the naming of any other goods in so far as it does not infringe the acquired rights of others, is purely a question of business, and just as the designation of other goods does not depend on a license or approval on the part of the authorities, so it is also unnecessary with regard to mineral waters. Nevertheless the above-named petitioner is to be warned not to use any trade-mark, name, firm or designation of business that would mislead the public, and the use of which would have to be repressed at the request of the injured parties according to sec. 23 and 24 of the II law of the year 1890. Budapest, 20th November, 1892. Lukacs M. P. No. 47273

714 I 1892

This ministerial rescript is communicated in an official copy to Mr. Francis Kiss of Kisbaar, advocate (Francis Joseph square 3) as representative of Gustav Kahn, attorney for Henry Mattoni, returning at the same time the petition along with enclosures. Budapest, 29th November 1892. The metropolitan council: Viola M. P. councillor (stamp one florin). I officially certify that the present copy is entirely identical with the original kept at the archives of the metropolitan council. Budapest, 16th March 1893. Dr. Ladislas Toldy M. P. principal keeper of archives. (L. S.) Stamp 50 kr. No. 591/1897. * * *

(Duly authenticated.)

431 COMPLAINANT'S EXHIBIT NOTICE OF SUIT.

Translated from Hungarian.

Extract of copy. No. 1811/1891. Attestation. I, Dr. Max Fürth, substitute of Albert Gaszner, Budapest royal notary public hereby testify the truth of the facts contained in the protocol faithfully and

literally quoted below. Protocol. Before me, Dr. Max Fûrth, substitute of Albert Gaszner, Budapest royal notary public there appeared this day the representative of the Budapest registered firm Andreas Saxlehner, Mr. Andor Saxlehner (of No. 3 Andrally-ut) who is personally known to me, and requested me to despatch the letters of the following tenour.

V. Budapest, 16th July 1891. To Messrs. Mattoni and Wille, Budapest. The trade-marks registered for you with the Budapest chamber of commerce and industry, and containing the following denominations, viz: "Szechenyi," "Deak," "Szent Istvan," "Hunyady Matyas," "Hunyadi Matyas," "Kiraly" and "Budai Keseruviz" (Buda bitter water) further the trade-mark used by you and containing the denomination "Erzsebet" are illegal and prohibited imitations of the trade-marks registered and protected for me with the same chamber of commerce and industry. The trade-marks containing the denominations "Hunyady Matyas" and "Hunyadi Matyas" constitute furthermore an illegal use of the denomination of my business establishment. I call upon you to have the trade-marks registered for you and containing the denominations "Szechenyi," "Deak," "Szent Istvan," "Hunyady Matyas," "Hunyadi Matyas," "Kiraly" and "Budai Keseruviz" struck off from the register of trade-marks within eight days from date of receipt of this letter, and to desist forthwith and finally from the use of these
432 trade-marks as well as of the trade-mark containing the denomination "Erzebet." I beg you will be good enough to satisfy me that you will comply with my present request. In the event of my present request not being acceded to I shall have to seek legal remedy. With much regard, per pro Andreas Saxlehner, Andor Saxlehner M. P.

At the present request I have today sent off by post the above letters and annexed the post-office receipts to this protocol. Given at Budapest, on the seventeenth of July one thousand eight hundred ninety-one. Dr. Max Fürth M. P. substitute of Mr. Albert Gaszner, Budapest royal notary public, as per decree No. 157 / 1891 of the Budapest chamber of royal notaries public (L. S.) (stamp one florin 50 kr.) In faith of which I have issued the present attestation bearing my signature and official seal, observing that on page 5 I have cancelled one word and wedged in one word, and also cancelled one word on page 7. Given at Budapest, on the twenty-first (21) of July in the year one thousand eight hundred ninety-one (1891). Writing 2 florins legalization 1 fl. 70 kr., stamp 1 fl. 50 kr. total 5 fl. 20 kr. (L. S.) Dr. Max Fûrth M. P. substitute of Mr. Albert Gaszner, Budapest royal notary public, as per decree No. 157 / 1891 of the Budapest chamber of royal notaries public. Stamp 50 kr. No. 592 / 1897.

COMPLAINANT'S EXHIBIT HUNYADY LASZLO DECREE.

Translated from Hungarian.

Copy. Budapest chamber of commerce and industry. No. 2136–94. Duplicate. To Mr. Andor Saxlehner, Budapest: In ac-

cordance with the rescript of his excellency the minister of commerce, No. 260,047, dated 25 May, 1894, we have the honour to return you your documents and to inform you that on the
433 trade-mark complaint raised by you as attorney of Mrs. Emily Pelikán, widow of Andreas Saxlehner, proprietress of the firm Andreas Saxlehner, against the Paris firm "Compagnie Generale d'eaux minerales et de bains de mer," the minister decided as follows: "I order to be cancelled in the capsule trade-mark No. 668, registered with the Budapest chamber of commerce and industry on August 22nd, 1891, for the Compagnie Generale d'eaux minerales et de bains de mer, because this trade-mark is entirely like the trade-mark registered for the plaintiff firm on July 14th, 1890, sub No. 125. I likewise order to be cancelled the trade-mark 'Hunyadi Laszlo,' registered for the defendant firm with the Budapest chamber of commerce and industry on Aug. 22nd, 1891, sub No. 667, because of the three experts consulted two have pronounced same to be entirely similar to the trade-mark registered for Saxlehner, and the danger of misleading is greatly augmented by the fact that on this trade-mark the name Hunyadi is applied in a prominent place. The alleged imitations by means of two not registered 'Hunyadi Laszlo' trade-marks enumerated in the petition of the plaintiff firm Andreas Saxlehner, are to be dealt with as trade-mark usurpations and these come, in virtue of § 26 of the II law of the year 1890, under the competence of the royal courts." At the same time we inform you that in accordance with the above ministerial decree the trade-mark registry office of our chamber has cancelled from the register the capsule trade-mark No. 668, registered for the firm Compagnie Generale d'eaux minerales et de bains de mer on Aug. 22nd, 1891, and the Hunyadi Laszlo trade-mark No. 667, registered for the same firm on Aug. 22nd, 1891. Budapest, 7th October, 1896. Budapest chamber of commerce and industry. Hûttl. M. P., vice-president, Peter Fritz, M. P., secretary. No. 703/1897. (Stamp, 50 kr.) I certify that this copy is exactly identical with the unstamped original produced by the Budapest registered firm Andreas Saxlehner. Given at Budapest 19th nine-
434 teenth of March, one thousand eight hundred ninety-seven. Legalization, 50 kr. stamp, 50 kr.; total, 1 fl. Dr. Albert Edmund Hajós, substitute appointed to Mr. Albert Gaszner, Budapest royal notary public, by decree No. 246/1896, of the Budapest chamber of royal notaries public (L. S.) No. 1752/pres. 1897. The signature and official seal of Dr. Albert Edmund Hajós as substitute of Albert Gaszner, Budapest royal notary public, is hereby legalized according to § 67 of the XXXV law of the year 1874. Budapest, 30th March, 1897. Dr. Francis Horvath, president (L. S.) No. 19465/min. of just., 1897. The signature and official seal of the president of the Budapest royal tribunal is hereby legalized. Budapest, 31st March, 1897. From the royal Hungarian ministry of justice, Dr. Albert Alexy, ministerial councillor. (L. S.)
(Duly authenticated.)

COMPLAINANT'S EXHIBIT HUNYADI SPRING CERTIFICATE.

Translated from Hungarian.

Copy. No. 9867/1893. Certificate. It is hereby certified that the bitter-water spring establishment called "Hunyadi Janos" situated in the Orsöd district which belonged to the Budapest firm Andreas Saxlehner that is to say up to the 24th May 1889 the date of Andreas Saxlehner's death was jointly owned by Andreas Saxlehner and his wife *née* Emily Pelikan and which since the 24th of May 1889 is the exclusive property of the widow of Andreas Saxlehner, *née* Emily Pelikan, bore and possessed the name of "Hunyadi" from the year 1863 until the year 1865 and since the year 1865 up to date uninterruptedly possessed and still does possess the name of "Hunyadi Janos;" and it is further certified that
435 the said bitter-water spring never possessed nor bore the name of "Victoria" that neither the late Andreas Saxlehner nor his wife Mrs. Andreas Saxlehner born Emily Pelikan nor the Budapest firm Andreas Saxlehner did ever use the name Victoria as a denomination of their spring establishment and that since the year 1865 bitter water never was nor is at present brought by either of them into commerce from the said spring establishment under the name of Victoria or under any other name differing in the slightest degree from the name "Hunyadi Janos." Budapest 5th September 1893. The mayor's office of the 1st district. Signed Osztoics, mayor. Signed Olhauser notary (L. S.).

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(Duly authenticated.)

COMPLAINANT'S EXHIBIT HUNYADI JANOS HUNGARIAN REGISTRATION.

Translated from Hungarian.

Copy. The Budapest chamber of commerce and industry. No. 2844/1887. Certificate. The undersigned chamber of commerce and industry hereby officially certify that a trade-mark entitled "Hunyadi Janos" has been on the 12th December 1873 registered under N C 10 in the trade-mark register kept by the register office of the undersigned chamber, on behalf of Andreas Saxlehner, bitter-water spring proprietor of Budapest for the legal protection of the Buda bitter water sold by the said Andreas Saxlehner and that previously to such registration no trade mark was registered into the trade-mark register of this chamber for the protection of bitter water. Budapest the 19th October 1887 the Budapest chamber of commerce and industry. Signed Baron Kochmeister. Signed Steinacher Odon secretary (L. S.).

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(Duly authenticated.)

436 COMPLAINANT'S EXHIBIT MATTONI LETTER.

Translated from Hungarian.

Copy. Budapest, 37 Terez-Körut, and Diana bath buildings. 12th November, 1896. To Mr. Andor Saxlehner, Budapest, Andrassy-ut. Replying to your esteemed letter of the 10th inst. we inform you that since the date of receipt of the decision of his excellency the royal Hungarian minister of commerce we have not brought into commerce any goods bearing our cancelled labels. Yours respectfully (L. S. Mattoni & Wille) Urbanek M. P. Signature illegible M. P. Registered No. 627/1897. Stamp 50 kr. I certify that this copy is exactly identical with the unstamped original produced by the Budapest registered firm Andreas Saxlehner. Budapest (13th) thirteenth of March (1897) one thousand eight hundred ninety-seven. Taxes: 1) writing; 2) legalization 30. 3) stamp 50 kr. total 80 kr. Dr. Albert Edmund Hajos, substitute of Mr. Albert Gaszner, Budapest royal notary public, as per decree 246/1896 of the Budapest chamber of royal notaries public. (L. S.)

* * * * * * *

(Duly authenticated.)

COMPLAINANT'S EXHIBIT 2D MATTONI LETTER.

Translated from German.

Copy. Budapest, 37 Terez Kornt and Diana bath buildings 27th January 1897. To Mr. Andreas Saxlehner Budapest. In reply to your favor of the 26th inst. we inform you that from now we are selling our Mattoni's King's Buda (Ofner) bitter water under the
mark enclosed herewith and are forcedly causing the former
437 mark registered sub No. 2351 to be cancelled before the 31st
inst. Yours respectfully (L. S. Mattoni & Wille): Signature illegible M. P. A. Urbanek, M. P. Translated from Hungarian: No. 626/97. Stamp 50 kr. I certify that this copy is exactly identical with the unstamped original produced by the Budapest registered firm Andreas Saxlehner. Budapest thirteenth (13th) of March one thousand eight hundred ninety-seven (1897). Taxes: 1) writing —; 2) legalisation 30 kr.; 3) stamp 50 kr. total 80 kr. Dr. Albert Edmund Hajos, substitute of Mr. Albert Gaszner, Budapest royal notary public, as per decree No. 246/1896, of the Budapest chamber of royal notaries public. (L. S.)

* * * * * * *

(Duly authenticated.)

COMPLAINANT'S EXHIBIT STATISTICAL CERTIFICATE.

Translated from Hungarian.

Duplicate. Royal Hungarian statistical office. No. 2467/pres. Official certificate. I hereby certify that the name Hunyadi Janos is not a geographical denomination and does not contain a geo-

graphical designation. This name was actually given by the Budapest firm Andreas Saxlehner to the bitter water which this firm is drawing from its wells and spring situated at Köerberck in the 1st district of the city of Budapest and which it brings into trade and sells under the name of "Hunyadi Janos." Budapest 2d August 1895. The director of the royal Hungarian statistical office. Signed Joseph Jekelfalussy ministerial co-nsilor. (L. S.) Royal Hungarian minister of commerce No. 3412/pres. I hereby legalise the above signature of Dr. Joseph Jekelfalussy director of
438 the royal Hungarian statistical office. Budapest November 16, 1895. For the minister. The secretary of state. Signed Vörös. (L. S.)

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(Duly authenticated.)

COMPLAINANT'S EXHIBIT APOLLINARIS INJUNCTION. March 25, 1898. J. A. S., Ex'r.

(Seal of Supreme Court of Judicature.)

1896, S. 2144.

In the High Court of Justice, Chancery Division, Mr. Justice Kekewich.

Folios 862.

Friday, the 4th day of June, 1897.

Beal, registrar.

Fo. 141. (Stamp L 1.)

Between EMILY SAXLEHNER, Plaintiff,
—
THE APOLLINARIS COMPANY, LIMITED, Defendants.

Chancery Registrar's Office. Entered 19 Jul-, '97. P. E. Reeves, Clerk of Entries.

(Stamp.)
(Admissions filed by W. H.)

This action coming on for trial before this court on the 16th the 17th the 18th the 23rd and the 24th days of February, 1897, in the presence of counsel for the plaintiff and defendants, upon reading the writ of summons issued in this action on the 25th
439 June, 1896, the pleadings in this action, an affidavit of Julius Charles Prince filed the 28th January, 1885, and an order dated the 30th January, 1885, in an action entitled "The Apollinaris Company Limited & The Anglo-Hungarian Mineral Waters Company Limited 1895 A. 97," an affidavit of Julius Charles Prince filed the 25th June, 1887, "in the matter of the registered trade-

marks Nos. 6356, 6357 and 9026 of the Apollinaris Company, Limited," an affidavit of Julius Charles Prince filed the 1st of October, 1890, the judgment of Mr. Justice Romer, dated the 7th April, 1891, defendants' answer to plaintiff's interrogatories filed the 4th August, 1894, in an action entitled, "Saxlehner *v.* The Apollinaris Company, Limited, 1887, S. 4775, an order dated the 13th April, 1894, made in the action entitled, Saxlehner *v.* Williams, 1893, S. No. 3085; an order dated the 13th April, 1894, made in the action entitled, Saxlehner *v.* Treharne, 1893, S. 3088," and the admission in writing, signed by the solicitors for the plaintiff and defendants, and several documents therein referred to, and upon hearing the evidence of the several persons named in the first column of the schedule hereto on their examination taken orally before this court upon the several days set opposite their names in the second column of the said schedule, and upon production to such persons on their said examination of the several documents and the exhibits marked with the marks set forth in the third column of the said schedule opposite to the names of such persons, respectively, and upon hearing what was alleged by the counsel on both sides, this court did order that this action should stand for judgment.

And the same standing for judgment this day in the paper, in the presence of counsel for the plaintiff and for the defendants, this court doth order and adjudge that the defendants The Apollinaris Company, Limited, their officers, servants and agents, be perpetually restrained from passing off in the United Kingdom, or
440 attempting to pass off in the United Kingdom, or enabling others to pass off in the United Kingdom, any Hungarian bitter water, not being Hunyadi Janos water, derived from the plaintiff's spring near Buda Pest, in the Kingdom of Hungary, as or for Hunyadi Janos water, or water from the said spring, by means of any name or description of which the name "Hunyadi" forms part.

And it is ordered that the defendants The Apollinaris Company, Limited, do (upon oath if required) deliver up to the plaintiff for destruction, or destroy, all labels and other trade documents and all capsules in their possession or power or under their control in the United Kingdom, which, by reason of their exhibiting the name "Hunyadi," are capable of being used for the purpose of passing off in the United Kingdom any Hungarian bitter water, not being Hunyadi Janos water, derived from the plaintiff's said spring, as or for Hunyadi Janos water, or water from the said spring.

And it is ordered that the following account be taken before the official referee in rotation, that is to say:

1. An account of the profits made by the defendants since the 26th March, 1896, by means of any sale of Hungarian bitter water, which, if effected after the date of this judgment, would have constituted a breach of the injunction hereinbefore contained.

And it is hereby referred to the taxing master to tax the plaintiff's costs of this action up to and including this judgment, except so far as the same have been increased by the plaintiff charging deception against the defendants otherwise than by the use of the

word "Hunyadi" in respect of which the injunction is granted, and also to tax so much of the defendants' costs of this action up
441 to and including this judgment as have been incurred by such charge of deception against the defendants otherwise than by the use of the word "Hunyadi," and the taxing master is to set off the said costs of the plaintiff and defendants when so respectively taxed and certify to which of them the balance of such set-off is due.

And it is ordered that such balance be paid by the party from whom to the party to whom the same shall be certified to be due.

And this court doth reserve the subsequent costs of this action.

And any of the parties are to be at liberty to apply on the result of the said account and otherwise generally to apply as they may be advised.

[Seal Supreme Court of Judicature.]

C. B. [L. S.]

442 *Schedule.*

Name of witness.	Date of examination.	Exhibits.
Louis Richter	17th February, 1897	LR[1], LR[2], LR[3], LR[4] and LR[5].
Bernard Dukes	" " "	
Michael Carteighe	" " "	MC[1], MC[2] and MC[3].
Joseph John Snook	" " "	JJS[1], JJS[2].
Philip Darvai	" " "	PD[1] to PD[31], both inclusive.
Walter Hills	17th and 18th February, 1897	WH[1].
Henry Hillier	17th February, 1897	
Charles Joseph Rees	18th " "	CJR[1].
Thomas Herbert Hudson	" " "	
Thomas Fell Abraham	" " "	TFA[1].
John Thompson	" " "	
Robert McAdam	" " "	RM[1].
Adam Gibson	" " "	
Augustine William Orr	" " "	
Isaac Thomas Smallman	" " "	
Rowland Thompson	" " "	
Samuel Parker Boyd	" " "	
Peter McCaig	" " "	
Henry Baily Skinner	18th " "	
Kurt R. Neufeld	" " "	
Julius Charles Prince	18th and 23rd February, 1897	JCP[1] to JCP[18], both inclusive.
Thomas Howell Williams		
Idris	23rd February, 1897	
Thomas Best	" " "	
George Randall Sloper	" " "	
Alexander Bottle	23rd February, 1897	
James Aloysius Walsh	" " "	JW[1].
Andrew Morrison	" " "	
James Wray	" " "	
William Gray Page	" " "	

C. B. [L. S.]

[Seal of Supreme Court of Judicature.]

443 COMPLAINANT'S EXHIBIT ANDRES AFFIDAVIT. March 25, 1898. J. A. S., Ex'r.

UNITED STATES CONSULATE GENERAL } ss:
At Vienna, Austria, }

Heinrich Mattoni, being duly sworn, upon his oath, saith, that he is one of the copartners of the firm of Mattoni & Wille, transacting business at Budapest, Hungary, and that the said firm is the owner and proprietor of the following bitter-water springs, to wit: The Franz Deak spring, the Stefan, Szechenyi spring, the Heinrich Hildegarde spring and the Mathias Hunyadi spring, all of which springs are situate in the Kingdom of Hungary aforesaid.

And this affiant further saith that the bitter waters of the Hunyadi Mathias spring have been exported to the United States of America by the said firm on very frequent occasions ever since the year 1880, and that the bitter waters so exported were put up and bottled in precisely the same manner as the bitter water shipped by the said firm during the year 1886 to its agent, Mr. Fr. Jacob Andres, in the city of New York, United States of America, and that the bottles containing said bitter water had all the same label attached, one of which labels is hereunto annexed marked Exhibit "A," and hereby made a part of this affidavit, and that no objection was ever raised or forced against the importation of said bitter water in the form aforesaid into the United States and to its sale into the American market until the Apollinaris Company, Limited, filed its bill of complaint and obtained an injunction against the sale of said bitter water in the circuit court of the United States for the second circuit and southern district of New York on the 11th day of December, A. D. 1886.

And this affiant further saith, that the same bitter water, the product of the said Hunyadi Mathias spring, has been ex-
444 ported by the said firm, put up in precisely the same shape, and with the same label, as the water exported to New York as aforesaid, to Great Britain and the British colonies in great quantities ever since the year 1877, and that the said bitter water has also ever since the said year 1877 been exported under the name of Hunyadi Mathias to nearly all the civilized countries on the globe, the label being simply translated into the language of the particular country to which the said water was exported as aforesaid.

And that for five or six years previous to 1877 the predecessors in business of the said firm and the former owners of the said spring exported the said bitter water in exactly the same form and manner, and that the spring from which the said bitter water is derived has borne the name of Hunyadi Mathias spring, as an officially recognized appellation, ever since the year 1877.

And for the purpose of proving the assertion last aforesaid as to the official recognition of the Hunyadi Mathias spring by the authorities of the Kingdom of Hungary this affiant begs leave to refer to

the documents hereunto annexed marked Exhibit B, and to the translations of the same, which documents and translations this affiant begs leave to make a part of this affidavit. And this affiant charges the fact and the truth to be that the document in the Hungarian language, bearing date on the 2nd of May, A. D. 1877, is a concession granted by the Emperor of Austria and King of Hungary, through his representative, the chief mayor of the city of Budapest, to this affiant and Emil Wille, the partners composing the said firm, to combine all the several springs above named under the general name of Ofner bitter water, and to sell the same under that general name, on the condition, however, that upon the label of the bottle containing said bitter water the names of the particular springs from which the water was taken should be printed,
445 and that the label should clearly show that the water contained in the bottle to which the label was attached was taken either from the Franz Deak, Stefan Szechenyi, Heinrich Hildegarde or Mathias Hunyadi spring, and this affiant asserts that in this manner and by the concession aforesaid the government of Hungary recognized officially that the said firm was the owner and proprietor of the said Hunyadi Mathias spring as far back as May 2nd, 1877, and that the said firm was not only permitted but compelled to print the said name of "Hunyadi Mathias" upon all bottles placed in the market or shipped by said firm.

And this affiant further saith that the name of Hunyadi is the name of a noble Hungarian family and that many nobles of that name are now living and residing in Hungary and that Hunyadi Janos means simply John Hunyadi and Hunyadi Mathias means Mathias Hunyadi and that the firm aforesaid has as good a right and claim to the spring called Hunyadi Mathias and to its product and name as the proprietors of the Hunyadi Janos spring have to its name and product, and that the name of said spring owned by this affiant and his copartner as aforesaid was not adopted in imitation of the name of the Hunyadi Janos spring.

And this affiant further saith that the said firm in putting up the said bitter water of the said Hunyadi Mathias spring as aforesaid, and in attempting to place the same upon the markets of the United States did not in any manner infringe upon the trade-mark of the said Apollinaris Company, Limited, the complainant, which trade-mark is claimed to consist of the words "Hunyadi Janos," nor upon the label attached to the bottles containing the said Hunyadi Janos bitter water, but that the label used by the said firm, attached to the bottles containing the said Hunyadi Mathias water contains in large prominent letters the words Royal Hungarian "bitter water,"
446 and also contains the name of said firm, viz: Mattoni and Wille, Budapest, and that, moreover, the central portion, being one-third of the full size of the said label used by said firm, is of a glaring red color, whereas the label used for Hunyadi Janos water is of a dark-blue color, and that the one could not possibly be mistaken for the other, and that it was never and is not now the intention of the said firm that the said labels should be thus taken the one for the other, but that, on the contrary, the said firm always

intended and now intends to sell the said Hunyadi Mathias mineral water under its own proper name, and as the natural product of the said Hunyadi Mathias spring, and that it is only owing to the neglect of the agent of said firm in New York that the label of said Hunyadi Mathias water has not long since been registered in the United States of America in accordance with the laws of that country, and that the said firm will employ counsel immediately for the purpose of procuring such registry at the earliest possible moment. And that the water sold by said firm under the name of Hunyadi Mathias is as much the natural product of the said Hunyadi Mathias spring as the Hunyadi Janos water is the natural product of the spring of that name, and is of exactly as good and valuable a quality for the purposes for which it is sold and recommended.

And this affiant further saith, that the shape of the bottles used in bottling the said Hunyadi Mathias water is an old shape of mineral-water bottle, having been in use for a long series of years by different parties and firms, and that the shape was not adopted by the said firm with any intention of infringing upon the said "Hunyadi Janos" trade or trade mark, but for the sake of its convenient and practical shape, and without any reference whatever to the bottles used by the said Apollinaris Company, Limited, as aforesaid.

447 And that the capsules used by this firm upon the said bottles containing Hunyadi Mathias water are stamped in an entirely different manner and that also the corks used are stamped differently from the manner in which the capsules and corks are stamped which are used for bottling the Hunyadi Janos water, and that the color and printing of the label as well as the stamping of the capsule and cork being different from the labels, corks and capsules used for putting up the Hunyadi Janos water it is quite impossible, that the one should be taken or sold for the other, and that it is the intention now and always has been the intention of the said firm to sell the water of the said Hunyadi Mathias spring upon its own merits and under its own proper name and not as an imitation of the said Hunyadi Janos water believing that the Hunyadi Janos water cannot justly claim an unlimited monopoly in the American market.

And this affiant further saith in conclusion, that aside from the said Hunyadi Janos and Hunyadi Mathias spring there are situate in the Kingdom of Hungary a number of other bitter-water springs, all of *whom* are named Hunyadi, viz: Hunyadi Laslo, Hunyadi Arpad, Hunyadi Kalman, all of which springs have been known under the said appellations for a long series of years and that the proprietors of the same, place the said waters of said springs upon the market under the said names respectively.

And that the firm of Mattoni as well as the firm of Mattoni & Wille enjoys an European reputation as mineral-water dealers for many years, the name of Mattoni being thus established for thirty years, and that such reputation is much superior and more extended than that of the Appollinaris Company, or of the Hunyadi Janos spring and that neither said firm nor said Mattoni need shield themselves or the wares which they place upon the market under any

other name, but are quite content to present the waters sold by them in their own name and firm. And that the name of Mattoni
448 upon any mineral water bottle is considered a guaranty of its genuineness.

HEINRICH MATTONI.

Subscribed and sworn to before me this 12th day of January, 1887.

EDMUND JUSSEN,
[SEAL.] *Consul General.*

Attached to the original affidavit is a red and white label marked Exhibit A of Royal Hungarian Hunyadi Mathiasquelle Bitter Water. Proprietors Mattoni & Wille.

UNITED STATES CONSULATE GENERAL } ss:
At Vienna, Austria, }

Otto Maas, being duly sworn, upon his oath, saith: that he occupies the position of United States vice-consul general at the city of Vienna, aforesaid, and that for the last twenty years he has carried on a printing and publishing establishment at said city.

That he is personally acquainted with Henry Mattoni, who executed the foregoing affidavit and with his partner, Emil Wille, and that he has frequently printed labels for the firm of Mattoni & Wille for the labeling of their bitter-water bottles, and that more than ten years ago he printed labels exactly like the label hereunto annexed marked Exhibit "A" for the use of the said firm.

And this affiant further saith that the name of "Hunyadi" is the family name of a Hungarian race of nobles, and that he has known for a long series of years that this name was used as an appellation for divers bitter-water springs in the Kingdom of Hungary, and that he also knows from his own knowledge that one of the said bitter-water springs, now owned by the said firm of Mattoni
449 and Wille, has borne the name of Hunyadi Mathias spring ever since the year 1870.

And that Hunyadi Mathias stands for Mathias Hunyadi and Hunyadi Janos for John Hunyadi, the Hungarians invariably placing the Christian after the family name.

And the affiant further says, that he knows of his own knowledge that for a long series of years a number of other bitter-water springs, situate in Hungary, have borne the name of Hunyadi, viz., the Hunyadi Laslo, Hunyadi Arpad and Hunyadi Kálman springs.

OTTO MAAS.

Sworn and subscribed to before me this 12th day of December, 1887.

EDMUND JUSSEN,
[SEAL.] *U. S. Consul General at Vienna, Austria.*

Attached to the original affidavit is a label marked Exhibit A similar in all respects to the label attached to the affidavit of Heinrich Mattoni.

UNITED STATES CONSULATE GENERAL } ss:
At Vienna, Austria, }

Gustav Kahn, being duly sworn upon his oath, saith: that he is now and has been ever since the year 1880, the agent of the firm of Mattoni and Wille and the manager of their mineral-water business at Budapest, Hungary, and that the Hunyadi Mathias spring, the waters of which the said firm of Mattoni & Wille have placed upon the market and exported to the United States of America and other foreign countries has been known by and has borne the name of "Hunyadi Mathias" ever since the year one thousand eight hundred and seventy-three (1873). That the said spring was originally owned by one Rezso Ensel Sandor, who let the same to one
450 Marcus in the year 1873, and that from the year 1873 up to the month of November of the year 1876, the said Marcus sold and placed upon the market and exported the waters of said spring under the said name "Hunyadi Mathias," and that during the whole of said time, while said Marcus sold the waters of said spring, he sold the same in bottles shaped like those in which the said Mattoni and Wille have placed the said waters upon the market, and that to all of said bottles a red label was attached bearing the name of "Hunyadi Mathias" and describing the waters contained in said bottles as "Hunyadi Mathias" bitter water.

And this affiant further saith, that in the month of November, A. D. 1876, when the lease of said spring, theretofore executed by the said Rezso Ensel Sandor to the said Marcus had expired, the said firm of Mattoni & Wille purchased the said spring from the said Rezso Ensel Sandor under and by the name of "Hunyadi Mathias" spring and that the said firm has ever since the said month of November, 1876, continued to place the said water upon the market and to export the same to foreign countries in exactly the same shape of bottles and under precisely the same name, viz., "Hunyadi Mathias," under which they have recently exported the same to the United States of America, consigning the same to their agent, Francis J. Andres, at the city of New York, State of New York.

And this affiant further saith, that the label hereunto annexed marked Exhibit "A" is the identical label, which has been in use by the said firm and by them attached to the bottles containing the said Hunyadi Mathias water and placed upon the markets of the United States of America through their said agent, since the year 1884, and that all waters of said spring sold by said firm in the home market or exported by them to other foreign countries aside from the United States of America, have since the said month of November, 1876, been sold and exported by said firm under the label, a copy
451 of which is hereunto annexed marked Exhibit "B" said label also showing clearly the name of Hunyadi Mathias.

And this affiant further saith that no copy of the complaint in the case of the Appollinaris against Andres was ever forwarded or delivered to said firm, either by said Andres or any other person, and that no such copy was ever received by them, or either of them, but that the only papers in the said case received by the said firm

was a copy of the preliminary injunction issued in said case, and that neither this affiant, as the agent of said firm or manager of this said business, nor the members of said firm, were aware or fully informed as to the nature and full extent of the possible effect and result of the said suit, but that this affiant believed and said Mattoni and said Wille believed, that the said suit effected only the small consignment of bitter water, viz., Hunyadi Mathias water, which they had consigned to the said Andres as aforesaid, and that under this impression and for this reason this affiant cabled to the said Andres, on the 4th day of December, 1886, directing him not to litigate the said suit; and that, furthermore, this affiant sent the said cable despatch to the said Andres upon his own responsibility and upon his own motion, without consulting either the said Mattoni or the said Wille and without their knowledge and consent, and this affiant was induced to thus instruct the said Andres by the further reason that he had no confidence in the business energy or capacity of the said Andres and intended to advise the said firm to appoint some other agent to represent them in New York before entering into any litigation, and that at the time of sending said cablegram this affiant was of the opinion that no other rights of the said firm were involved in the said suit except the right to sell the particular lot of "Hunyadi Mathias" bitter water then in the hands of the said agent Andres.

And this affiant further saith that neither the said Mattoni nor the said Wille can read or understand the English language,
452 and that this affiant is quite deficient in his knowledge of the English language, and that he therefore did not fully understand the said copy of the order of preliminary injunction nor the full force and extent of the same at the time when the same was received as aforesaid, and that the said full force and extent of said order was not fully understood and explained to this affiant until after the sending of said cablegram of the said 4th of December, 1886.

GUSTAV KAHN.

Subscribed and sworn to before me this 4th day of March, 1887.

EDMUND JUSSEN,
United States Consul General at Vienna, Austria. [SEAL.]

Attached to the original affidavit is a label marked Exhibit A, similar in all respects to the exhibit attached to the affidavit of Heinrich Mattoni. Also a label marked Exhibit B, "Mattoni féle Hunyady Mathyás Budai Keserüviz Farras."

UNITED STATES CONSULATE GENERAL } *ss:*
At Vienna, Austria, }

Heinrich Mattoni and Emil Wille, copartners, composing the firm of Mattoni and Wille, and transacting business in Budapest, Kingdom of Hungary, being each severally duly sworn, do depose and say: That the foregoing affidavit of Gustav Kahn, their agent and

manager of their mineral-water business at said Budapest, has been translated and fully explained to them by Edmund Jussen, the United States consul general, at Vienna, Austria, and that they know and each of them knows the contents thereof, and that the same is true in substance and in fact of their own knowledge.

HEINRICH MATTONI.
EMIL WILLE.

Subscribed and sworn to before me this 4th day of March, A. D. 1887.

EDMUND JUSSEN,
U. S. Consul General. [SEAL.]

453 UNITED STATES CONSULATE GENERAL }
At Vienna, Austria, } *ss:*

Otto Maass, being duly sworn, upon his oath saith: That he is a printer and publisher by occupation, transacting business in the city of Vienna, Empire of Austria, and that he has been appointed and qualified as United States vice consul general at Vienna, Austria, and that he has been for many years personally acquainted with both of the partners of the firm of Mattoni and Wille, who are large dealers in Hungarian bitter water, and have for many years maintained the principal depot for such waters, at Budapest, in the Kingdom of Hungary.

And this affiant further saith: That he has on very frequent occasions printed labels for the said firm of Mattoni & Wille, to be used for the purpose of labelling the bottles containing said Hungarian bitter water, and that he finds upon an examination of his business books, and remembers also distinctly without reference to said books that as far back as the year one thousand eight hundred and seventy-seven (1877) he printed many thousand of such labels for the uses and purposes aforesaid, said labels being printed partly in the German and partly in the English language, and that all of such labels contained the name of "Hunyadi Mathias" and the name of said firm, and described the waters contained in the bottles to which such labels were to be affixed as "Hunyadi Mathias" bitter water.

This affiant further saith, that he has known the said waters to have been offered for sale in the market of Austria-Hungary, ever since the year one thousand eight hundred and seventy-three under the name of "Hunyadi Mathias," and knew the same to be sold and to be generally known under that name for about four years before he printed said labels.

OTTO MAASS.

Sworn to and subscribed before me this 5th day of March, 1887.

[SEAL.] EDMUND JUSSEN,
U. S. Consul General at Vienna, Austria.

454 UNITED STATES CONSULATE GENERAL }
At Vienna, Austria. }

Moritz Plössl, being duly sworn upon his oath saith, that he is a resident of the city of Vienna, Empire of Austria, and forty years of age, and that he is now and has been in the employ of the firm of Mattoni & Wille since the year 1877, at their place of business in Vienna, Austria, at which they maintain a depot of Hungarian bitter water, as well as at Budapest, Hungary, and that this affiant was employed by said firm as salesman up to 1882, and as superintendent of their bitter-water depot since said year 1882. And this affiant further saith, that he knows from his own knowledge that said firm of Mattoni & Wille have kept in store and sold in the market of said city of Vienna the bitter water known as "Hunyadi Mathias" bitter water, and under a label, containing the name of "Hunyadi Mathias," and the name of said firm ever since the year one thousand eight hundred and seventy-seven (1877) and that under said name and label the said bitter water has been also exported to foreign countries by said firm of Mattoni & Wille from their said depot at Vienna ever since said year 1877, and further this affiant saith not.

MORITZ PLÖSSL.

Subscribed and sworn to before me this 7th day of March, 1887.

EDMUND JUSSEN,
U. S. Consul General. [SEAL.]

455 TRANSLATION OF COMPLAINANT'S EXHIBIT CIRCULAR OF DECISIONS. March 5, 1898. J. A. S., Ex'r.

BUDAPEST, *November*, 1896.

Mr. —— ——:

I take the liberty of requesting your attention to the following deductions:

It is a fact known to my customers that my firm has at all times designated its bitter water which has been in commerce for more than thirty-five years, by the name or trade-mark "Hunyadi Janos." I have spared no pains in introducing my water everywhere, and I have succeeded in making my trade-mark popular in all parts of the world and to secure to the "Hunyadi Janos" water the markets of the world. The custom of commerce in general tending to the greatest possible shortening of trade-marks, together with the peculiarities of language of the different nations have brought it about, that the trade-mark "Hunyadi Janos" characterizing my wares, has become familiar among consumers as well as among jobbers in the shortened forms of "Hunyadi" and "Janos." It is known that every success in industrial and commercial lines acts in a stimulating manner on others, urging them to take part in such success without going to any trouble, and to join in and enjoy the hard-earned fruits of the unceasing labor of another. One of the meanest forms of the sordid competition appears in the imitation of trade-

marks which have become marketable and popular by the commercial endeavors and labors of others.

Since my trade-mark has gained larger fields of commerce, and since it began to play an important part in the commerce of the world my firm has met at every step the sordid endeavors of illegal competition. All devices and practices, which are of daily occurrence in such mean competition, were used against me and I
456 was finally compelled to take a firm stand against this continually increasing misuse, and to seek the aid of the authorities.

In the year 1894, as a result of steps taken by me at that time, the royal Hungarian minister of commerce, the only and highest judge in questions of trade-mark, caused the cancellation of the trade-marks of Eduard Steinkopff, No. 899, 1428, 1613, 1615, 1720, 1721, 1905, 2260; the trade-marks of the firm Mattoni & Wille No. 1579, 1580, 1581, 1582, 1583, 1892, 1893; the trade-mark of Moritz Hirschler No. 1737; the trade-marks of the firm Moritz S. Blau Söhne No. 1176, 1216, 1217, and 1218; the trade-marks of the firm Johann Loser, No. 1978, 1979, 1995, 2005, 662; the trade-marks of Compagnie Generale D'Eaux Minerales et de bains de mer No. 667, 668; the trade-mark of the firm Kolomon Lozert and Martin Grossinger No. 10; the trade-mark of the firm Frau Max Buchwald No. 1124; and the trade-marks of Ludwig Schmidthauer, No. 2 and 17, by decrees of cancellation.

As a result of further complaints filed by me in the year 1896 the following trade-marks were likewise cancelled as interfering with my trade-mark rights, as will appear from the following facts:

By decree No. 5052/1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the "Uj Hunyadi Company" was ordered.

1. The word trade-mark "Uj Hunyadi" No. 3366.
2. The word trade-mark "Uj Hunyadi" No. 3670.
3. The word trade-mark "Uj Hunyadi Reszveny-tarsasag" No. 3767.
4. The word trade-mark "Uj Hunyadi Aktienge-sellschaft" No. 3768.
5. The word trade-mark "The Uj Hunyadi Company Limited" No. 3769.
6. The word trade-mark "Uj Hunyadi societe anonyme" No. 3770.
7. The figure trade-mark containing the words "Uj Hunyadi" No. 3132.
457 8. The figure trade-mark containing the words "Apenta" "Uj Hunyadi" No. 3631.
9. The figure trade-mark containing the words "Apenta" "Uj Hunyadi" No. 3651.
10. The figure trade-mark containing the words "Apenta" "Uj Hunyadi" No. 3776.

By decree No. 43027/1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the firm of Mattoni & Wille was ordered:

1. The figure trade-mark "Hunyady Matyas" No. 2350.
2. The figure trade-mark "Hunyady Matyas" No. 2497.
3. The figure trade-mark "Hunyady Matyas" No. 2498.
4. The figure trade-mark "Hunyady Matyas" No. 2508.
5. The figure trade-mark "Hunyady Matyas" No. 3303.
6. The word trade-mark "Hunyady Matyas" No. 3367.

By decree No. 38043/VI. 1896 of the royal Hungarian minister of commerce the cancellation of the following trade marks of the firm "Ludwig Schmidthauer" was ordered:

1. The figure trade-mark "Radetzky" No. 19.
2. The figure trade-mark "Hunyadi Lajos" No. 37.

By decree No. 48840/1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the firm "Johann Loser" was ordered:

1. The figure trade-mark No. 1092.
2. The figure trade-mark No. 1975.
3. The figure trade-mark No. 1994.
4. The figure trade-mark No. 3282.

458 By decree No. 38042/1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of "Koloman Lozert and Martin Grossinger" was ordered:

1. The figure trade-mark "Corvin Janos" No. 39.
2. The figure trade-mark "Corvin" No. 43.

By decree No. 43282 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the firm "Moritz S. Blau Söhne" was ordered:

1. The word trade-mark "Hunyadi Miklos" No. 3485.
2. The word trade mark "Hunyadi Istvan" No. 3486.
3. The word trade-mark "Rakoczy Arpad" No. 3487.
4. The word trade-mark "Hunnia" No. 3488.
5. The figure trade-mark "Hunyadi Miklos" No. 3127.
6. The figure trade-mark "Hunyadi Miklos" No. 3206.
7. The figure trade-mark "Hunyadi Miklos" No. 3207.
8. The figure trade-mark "Hunyadi Istvan" No. 3241.
9. The figure trade-mark "Hunyadi Istvan" No. 3242.
10. The figure trade-mark "Hunyadi Istvan" No. 3243.
11. The figure trade-mark "Rakoczy Arpad" No. 3304.

By decree No. 39945/VI. 1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the firm "Moritz Hirschler" was ordered:

1. The figure trade-mark "Hunyadi Jozsef" No. 2423.

459 2. The figure trade-mark "Hunyadi Jozsef" No. 2687.

3. The figure trade-mark "Hunyadi Ferencz" No. 2688.
4. The word trade-mark "Hunyadi Jozsef" No. 3362.
5. The word trade-mark "Hunyadi Ferencz" No. 3363.

By decree No. 43281/VI. 1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of the firm "Jakob Hoffman" was ordered.

1. The figure trade-mark "Hunyady Gyozo" No. 3295.
2. The word trade-mark "Hunyady Gyozo" No. 3530.

By decree No. 41771/1896 of the royal Hungarian minister of

commerce the cancellation of the following trade-marks of "Sigmund Kentner" was ordered:

1. The word trade-mark "Hunyadi Alajos" No. 3426.
2. The word trade mark "Hunyady Vilmos" No. 3425.
3. The word trade-mark "Hunyady Almos" No. 3427.
4. The word trade-mark "Hunyady Akos" No. 3428.
5. The word trade-mark "Huniada" No. 3430.

By decree No. 42904/1896 of the royal Hungarian minister of commerce the cancellation of the following trade-marks of "Sigmund Kentner" was also ordered:

6. The figure trade-mark "Hunyady Alajos" No. 3393.
7. The figure trade-mark "Hunyady Alajos" No. 3401.

460 8. The figure trade-mark "Hunyady Vilmos" No. 3477.

9. The figure trade-mark "Hunyady Alajos" No. 3506.

It gives me satisfaction to be able to state that my rights have been upheld, and it gives me pleasure to inform my business friends of these facts now, who, if they desire it, may inspect all these decrees, the publication of all of which in one pamphlet I reserve to myself. I request my honored business friends to take notice of these statements of mine, and at the same time give public notice, with the foregoing as a warning, that I shall proceed against every one unrelentlessly, whenever and wherever I meet imitations of my trade-mark.

Very respectfully, ANDREAS SAXLEHNER.

COMPLAINANT'S EXHIBIT TRANSLATION OF LETTER TO ANDRES.
March 26, 1898. J. A. S., Ex'r.

BUDAPEST, *November* 16, 1886.

Mr. Fr. Jac. Andres, New York, 21–24 Whitehall St.:

We received your favor of the 30th ult. and have examined your account, which we find correct, with exception of your statement of stock * * *

In regard to the bitter-water business at your place, we shall first await the end of the suit of the Apollinaris Company against Ungar, but send you today for all emergencies by way of Hamburg 3,200 labels according to the enclosed pattern which we just happen to have still in stock; we think that it will not make any difference that the former firm of P. Scherer & Co. is named thereon, and you may eventually cut off the strip underneath. The

461 capsules need not be exchanged, as the word "Hunyadi" is not contained on them.

Respectfully, THE MANAGEMENT OF THE SIX UNITED OFEN BITTER SALT SPRINGS.
MATTONI & WILLE.
Kahn A. Urlanek.

COMPLAINANT'S EXHIBIT SIEGEL-COOPER ADVERTISEMENT.

THE EVENING SUN, *Wednesday, March* 23, 1898.

Siegel-Cooper Co.

Sale extraordinary of drugs and toilet preparations.

* * * * * *

Hunyadi water ..... 14c.
Hunyadi Apenta..... 7c.

COMPLAINANT'S EXHIBIT UJ HUNYADI DECREE. J. A. S., Ex'r. March 31, 1898.

Royal Hungarian
minister of commerce
No. 50552
1896

Andor Saxlehner, Esq., as attorney of Mrs. Emily Pelikan, widow of Andreas Saxlehner, proprietor of the firm Andres Saxlehner.

BUDAPEST, *VI. Andrássy-Strasse* 3.

Upon the complaint raised by Andor Saxlehner of Budapest as representative of Mrs. Emily Pelikán, widow of Andreas Saxlehner, proprietor of the Budapest firm Andreas Saxlehner, against
462 the Budapest registered firm "Uj Hunyadi részvény-társaság" (New Hunyadi Company Limited) with a view to cancelling certain trade-marks, and having consulted in this matter the Budapest chamber of commerce and industry and also the senate of trade-marks I hereby order the cancelling of the following trade-marks registered with the Budapest chamber of commerce and industry, to wit:

1. The verbal trade-mark called "Uj Hunyadi" registered on the 2nd August 1895 for Edward Steinkopff sub No. 3366 and transferred to the defendants.

2. The verbal trade-mark called "Uj Hunyadi" registered on the 3rd of December 1895 sub No. 3670 for Edward Steinkopff and transferred to the defendants.

3. The verbal trade-mark called "Uj Hunyadi Részvénytársaság" registered on the 24th of January 1896 sub No. 3767 for the defendants.

4. The verbal trade-mark called "Uj Hunyadi Actiengesellschaft" registered on the 24th of January 1896 sub No. 3768 for the defendants.

5. The verbal trade-mark called "Uj Hunyadi Company Limited" registered on the 24th of January 1896 sub No. 3769 for the defendants.

6. The verbal trade-mark called "Uj Hunyadi Société Anonyme" registered on the 24th of January 1896 sub No. 3770 for the defendants.

7. The illustrated trade-mark containing the words "Uj Hunyadi" registered on the 28th of March 1895, sub No. 3132 for Edward Steinkopff.

8. The illustrated trade-mark containing the words "Apenta," "Uj Hunyadi," registered on the 19th of November 1895 sub No. 3631 for Edward Steinkopff and transferred to the defendants.

9. The illustrated trade-mark containing the words "Apenta," "Uj Hunyadi" registered on the 25th of November 1895 sub No. 3651 for Edward Steinkopff and transferred to the defendants.

463 10. The illustrated trade-mark containing the words "Apenta," "Uj Hunyadi" registered on the 28th of January 1896 sub No. 3776 for the defendants.

The defendants are condemned to pay to the plaintiff according to para. 6 of the XLI of the year 1895 the sum of 65 florins being the ready-money expenses caused by the action and the legal representation.

Motives.

It is a proved fact that the late Andreas Saxlehner who was the founder of the Budapest firm Andreas Saxlehner has for more than 30 years denominated all the bitter waters he used to sell by the names "Hunyadi János" and "Hunyadi" respectively and also that his universal legal successor his widow *née* Emily Pelikán has always carried and is still carrying on the business with that characterizing denomination.

It is another stated fact the denominations "Hunyadi János" and "Hunyadi" respectively given to the bitter water introduced by Andreas Saxlehner were generally known in the country already in the year 1863 and shortly afterwards also abroad. That activity which Andreas Saxlehner displayed both in the country and abroad in order to make known the individualizing and distinguishing names of "Hunyadi János" and "Hunyadi" given to the bitter waters which he brought into trade had the consequence that as we know by experience is under similar circumstances generally the case, the business itself was called by that name, that is to say that the business itself became known under that denomination.

Thirdly it is a proved fact that Andreas Saxlehner was the first to use the denomination- "Hunyadi János" and "Hunyadi" for the bitter waters drawn from his Buda springs, while on the other
464 side it is notorious that the bitter waters coming from the Buda springs were already an object of trade before Andreas Saxlehner started his business.

Finally from the register of trade-marks kept by the Budapest chamber of commerce and industry as well as from the official certificates issued by this chamber it appears that Andreas Saxlehner was the first who had registered a trade-mark on bitter water, the characteristic parts of which were formed by the words "Hunyadi János," the division into a threefold field, and the application of the portrait.

Considering that the firm of Andreas Saxlehner for a period of more than thirty years never ceased to employ the name of "Hun-

yadi János" in its business activity extending both in the home and the foreign trade, this name became a designation of its business. (Article 10 of the IInd law of 1890.)

A certain name is the more closely connected with the business, the greater the endeavours and expenses were which the proprietor of the business employed in creating and propagating the public notion that the chosen denomination represents his business and its products. From this consistent commercial activity requiring considerable sacrifices, results the appropriation of the name which is protected by the law. Whereas the firm of Andreas Saxlehner has with purposeful activity and considerable expenses connected the name in question with its business, the exclusive use of this name for the purpose of denominating bitter water or mineral water and similar products is an exclusive and individual right of the firm of Andreas Saxlehner, against the infringement of which protection is granted by the law upon the trade-marks (paragraphs 10 and 24 of the IInd law of the year 1890 and paragraph 9 of the XLI law of the year 1895).

Therefore in judging the object of the present complaint it had to be taken as a departing point that the words "Hunyadi János" and "Hunyadi" ever since a time which in point of view of trade may be called very considerable, have served and in fact
465 even actually do serve as a designation of Andreas Saxlehner's business and of the products of such business; on the other side it can be fairly stated by the report made by the said chamber as well as by the matters of fact well known to this ministry that the above commercial denomination has become common all over the world and has passed into the cognizance of the international public in the most extensive sense of the word.

In foreign countries either both of these characterizing words or only one of them became a term for the designation of Andreas Saxlehner's business, that is to say of the products of that business, according to the peculiarities of the languages of the different nations.

The consuming public living in Germany, England and in the United States of North America, etc., know the business of the plaintiff and the products coming from it under the denomination of "Hunyadi Janos" or in an abbreviated form "Hunyadi" whereas the French, Italians, Spaniards and the Roman nations in general have become used to the word "János" to such an extent that they ask for Saxlehner's bitter water merely under the name of "Hunyadi János water," "Hunyadi wasser" "Hunyadi water," "Eau de János" "Acqua di János," without mentioning the firm at all.

It is therefore stated in the first place that the words "Hunyadi János" or, abbreviated, "Hunyadi" or "János" form the commercial denomination of the business and of the business products of the firm of Andreas Saxlehner, and in the second place that the trademarks registered by the firm Andreas Saxlehner with the Budapest chamber of commerce and industry on the 12th of December 1873 under No. 10 and several times afterwards were characterized by these words, and also that the words "Hunyadi János," "Hun-

yadi" and "János" were likewise registered on behalf of the firm of Andreas Saxlehner in the register of trade-marks of the Buda-
466 pest chamber of commerce and industry as verbal marks fit to be registered in the sense of para. 1 of the XLI law of the year 1895 and this previously to any other firm producing bitter water.

The individual special right of the firm Andreas Saxlehner is therefore equally based upon the commercial denomination introduced by it as upon the trade-mark rights it has acquired. Earlier than this firm no one else has ever denominated bitter water or other mineral water by the words "Hunyadi János," "Hunyadi" or "János" nor has any one else acquired by registration, either for bitter-water products or for the words in question any trade-mark protection, so that the plaintiff's firm is entitled to the priority for the exclusive use of these words as a commercial denomination (para. 10 of the II law of the year 1890) as well as a trade-mark (para. I of the XLI law of the year 1895) nor could the objections raised against the right of exclusive use of these words which the plaintiff's firm appropriated in a regular and legal manner, be taken into consideration.

In the first place that objection had to be left out of consideration, that the words "Hunyadi János," "Hunyadi" and "János" were not suitable for commercial denomination and for the registration as trade-marks. The use of single words for the purpose of distinguishing products, manufactures and goods destined for commerce from other similar products, manufactures and goods (para. 1 of the IInd law of the year 1890) is only excluded in that case where these words are commonly used in trade for denominating certain classes of goods (para. 3 of the IInd law, of the year 1890) or where these words contain information with respect to the place, the time and the manner of producing the goods, or to the quality, the destination and question of price, quantity and weight of the goods (para. 1 of the XLI law of the year 1895). These circumstances however which make the words unable to be registered as a trade-
467 mark or to be used as a commercial denomination, do not exist in the present case, because the words "Hunyadi János" or either of these words if used for the denomination of goods, are merely fancy words. The words "Hunyadi János" or either of them, if used as a denomination of goods cannot raise in anybody's mind any reference either personal or real to the names "Hunyadi János," "Hunyadi" or "János." According to the nature of commerce it is out of any question whatever, that the use of the words "Hunyadi Janos" or of the word "Hunyadi" for denominating bitter water should be brought into connection with the identical or similarly sounding name of any living person and for this reason in judging whether the words "Hunyadi" or "János" are fit for a denomination of goods or to be used as a trade-mark it is entirely immaterial, even if a person of such name does really exist. It is the activity of the firm "Andreas Saxlehner" which has given importance to the words in question as a denomination of goods, or as a trade-mark, and everybody, who either in the country or abroad

enquires for bitter water with the denomination "Hunyadi János," "Hunyadi" or "János," knows well that this name is not a proper name, but a fancy name, passed into individual property, used for the denomination of goods.

It is equally doubtless that these words, under which as everybody knows, they sell Saxlehner's Buda bitter water, have no connection whatever with the geographical or administrative denominations existing in this country and sounding entirely or partly similar, such as: "County of Hunyad," "Bánffy-Hunyad," "Vajda-Hunyad," "Hunyadi-Tér" (square), "Hunyady-uteza" (street). This fact which needs no proof, is not altered by the circumstance, but the spring territory of the plaintiff's firm situated in the first district of the city of Budapest in the Örsöd area is on some maps marked with the name of "Hunyadi János" or "Hunyadi;" for this cannot and does not make a geographical denomination of these words. From these statements
468 follows the rejection of all those objections which are raised against the trade-mark rights of the plaintiff's firm on the ground that the words "Hunyadi János," "Hunyadi" and "János" used as *as* the denomination of goods or as a trade-mark, are no fancy words. And also those objections had to be left out of consideration that the words "Hunyadi János," "Hunyadi" or "János" are expressions designating the quality of the goods (para. 1 of the XLI law of the year 1895) or that these words are such denominations as are usual in trade for the designation of certain goods, in the present case, for the designation of Hungarian bitter water.

The facts here-above stated show that these objections are unfounded. These words, it is true, are generally known all over the globe as designations for bitter water, but they have from the very beginning and continually been connected with Saxlehner's bitter water, so that they do not serve for the denomination of bitter water in general or of Buda bitter water, but for the denomination of the Buda bitter water of the plaintiff's firm. Ever since by the activity of the firm Andreas Saxlehner these words have appeared in the home and the world's market in connection with bitter water and have acquired importance, the plaintiff's firm has always set bounds against the generalization of this denomination of goods spontaneously chosen by it, a reason why, in the present state of our legal institutions, the explicit scope of which is the effectual protection of individual property in respect of trade-marks, the rights of the plaintiff concerning the denomination of goods and the trade-marks must receive that protection which the law assures them.

Even if the exception saying that the name "Hunyadi" has in the course of time become a general denomination of Buda bitter water, were justified, which however has by no means been proved, this would only be one reason more, that the acquired rights
469 of the original owner of this denomination of goods should be legally protected, because the general use caused by the activity of the original owner and the popularity of any denomination whatever for goods cannot make it cease to be an individual

property, and cannot *ipso facto* serve as a legal title for others to make competition to the legitimate owner under the same known denomination and because § 3 of the IInd law of the year 1890 prohibits only the registration of those denominations of goods, which in the trade are already generally in use for the denomination of certain classes of goods, but does not deny protection to those denominations of goods, the legal security of which by means of registration is sought by that proprietor who has himself created the denomination by making a current article of his own merchandise and who has never parted with his individual rights respecting the denomination of the goods.

Thus the words "Hunyadi János," "Hunyadi" and "János" used as denominations of goods are pure fancy words, words which neither designate a quality, nor are generally used in trade for the designation of special classes of merchandise; they are therefore doubtlessly suitable for use as a mercantile denomination or as a trade-mark and therefore entitled to protection. It is the consequence of this protection that, in the sense of the law relative to trade-marks no other producer, tradesman or merchant can either register these words as a trade-mark or otherwise use them as a designation in application to the same class of goods.

For the above reasons the verbal marks Nr. 3366, 3670, 3767, 3768, 3769 and 3770 registered for the defendant's firm as specified in the dispositive part of the present decision, had to be cancelled, because the name "Hunyadi" is used in them for the use of which word and name the firm of Andreas Saxlehner acquired the right of priority with its verbal mark registered on the 2d August, 1895, sub
470 Nr. 3330 by virtue of the XLI law of the year 1895, for which reason any verbal mark contrary to this acquired right is null and void according to par. I of the article of the above-cited law and is as such to be cancelled according to section *e* of para. 21 of the IInd law of the year 1890.

This legal situation cannot be affected by the defendant's allegation referring to the circumstances arisen at the time of registration of the trade-mark and saying that his (the defendant's) having been filed at the same time as that of the plaintiff the defendant ought to be recognized at least as equally entitled, because for establishing the priority between the trade-marks the registry number of the trade-mark register is alone decisive, unless the contrary can be proved, which in the present case cannot be done, and also because, even in the case that the defendant's trade-mark has been registered before that of the plaintiff, the para. 4 of the XLI law of the year 1895 allows the plaintiff to institute proceedings for cancellation and to vindicate his earlier acquired rights against the formal right of his adversary based upon para. 1 of the above-cited law.

The illustrated trade-marks Nr. 3631, 3651 and 3776 registered for the defendants and specified in the dispositive part of this decision had to be cancelled because the denomination "Hunyadi" used in these trade-marks is prejudicial to the rights acquired by the firm of Andreas Saxlehner. Such a word or denomination, which, as in the present instance the name "Hunyadi," on the basis

of para. 8 of the XLI law of the year 1895, protected as a verbal trade-mark for the plaintiff's benefit, cannot be used in an illustrated trade-mark registered under the above-mentioned law. The defendant's exception emphatically preferred with reference to the "Apenta" trade-mark Nr. 3631 could likewise not enter into consideration, namely that the name "Hunyadi" is applied to this trade-mark on a less conspicuous place, in smaller print, and only for the purpose of stating that the "Apenta" water is taken
471 from the springs of the "Uj Hunyadi Company Limited," and that the complaint is altogether groundless because the trade-mark in question (Apenta) is entirely different from the name "Hunyadi," and that the application for cancelling the trade-mark cannot stand good, on the basis that the word "Hunyadi" is mentioned for the reasons just stated in the text of the illustrated trade-mark and that nobody can be allowed an exclusive right to use the word "Hunyadi" to such an extent that no one else should ever be entitled to use that word in any way whatever. None of these reasons could be looked upon as conclusive in deciding the present case. Ever since the 2nd of August 1895 the name "Hunyadi" has become a verbal trade-mark registered for the firm Saxlehner; after that day nobody else is allowed to use the same either as a trade-mark or on a trade-mark, nor in general in the manner described and for the purpose stated in para. 111 of the IInd law of the year 1890. With regard to the trade-mark in question Nr. 3631 it is not true that the word "Hunyadi" is not used as a trade-mark thereon, seeing that the mark is "Apenta." This allegation is false, because it is not the word "Apenta" alone which in the trade-mark Nr. 3631 forms the trade-mark properly so called, but an illustrated mark being in question it is the whole illustration which constitutes the trade-mark, on which, besides the word "Apenta," the name "Hunyadi" also is used. Consequently the fact that the words "Apenta" and "Hunyadi" are not identical does not infer the invalidity of the complaint, because the complaint in this case was not raised against the verbal trade-mark "Apenta" (the cancellation of which as such has not even been applied for), but against the illustrated mark "Apenta" requesting the word "Hunyadi" to be cancelled from the same. Therefore the examination of the complaint could not be denied on the basis of the defendant's exception, for every action is admissible which the authorized person raises
472 against the lawful use of his verbal trade-mark, even though the illustrated trade-mark be different in other respects as everything which is on the trade-mark has to be regarded as an integral part of the same. Nor do the other arguments of the defendants stand to reason either.

The fact that the name "Hunyadi" has been used in the illustration of the trade-mark in a less conspicuous place and in smaller print is of no importance compared with the plaintiff's right which excludes everybody else from using the word "Hunyadi" as a trade-mark or on a trade-mark, etc. And as to saying that the name "Hunyadi" has been put on the mark because it was necessary to indicate the name "Apenta" as such which comes from the "Uj

Hunyadi" springs of the defendant, it was ascertained that a bitter-water spring of the name "Apenta" does not exist at all, that the word "Apenta" is a mark serving for the commercial denomination of the defendant's merchandise and not the name of the spring, and, if it be true, that the defendants have a water named "Apenta" there is no acceptable reason whatever why the defendants, while having the name of this water registered as a trade-mark, should designate this water by another name, in the present case by the name "Hunyadi," unless the using of this word in connection with "Apenta" be caused by other particular reasons or designs.

The defendants state this reason by saying that they are entitled to use the name "Hunyadi" and that they are entitled and have to use it, because it is contained in the name of their springs and their firm "Uj Hunyadi." This exception shall be particularly treated hereafter in connection with the complaint raised against the trade-mark Nr. 3132.

As to this mark 3132, this illustrated trade-mark fully referred to in the dispositive part of the decision, had likewise to be cancelled, because the inscriptions "Uj Hunyadi" and "Natural Hun-
473 yadi water" used on this mark have an effect leading to misunderstandings and prohibited by para. 4 of para. 3 and by para. 25 of the IInd law of the year 1890.

With regard to this trade-mark it was ascertained that it is not similar to any mark of the plaintiff, either as to its form or as to its composition. However the misleading effect prohibited by the law is produced not only by similarity of form but for this purpose, even without any similarity of form it will be sufficient if the commercial denomination of the competitor's business (para. 10 of the IInd law of the year 1890) or goods is used in such a way that in spite of the difference of the illustration the public might be induced to believe that it has to do with the same goods with a similar or identical denomination, although with a different mark.

The protection of the lawful proprietor of the trade-mark cannot be limited in the sense of para. 25 of the law merely to similar trade-marks, as in such a way the lawful proprietor of the trade-marks would be only protected against the most maladroit adversary, whereas according to our trade-mark law also that sort of unfair competition is to be excluded which lays a stress upon the identity of the inscription.

Namely section 4 of para. 3 of the IInd law of the year 1890 prohibits all inscriptions which do not correspond to the real commercial conditions and are proper to mislead the consuming public. The inscriptions however of the illustrated trade-mark Nr. 3132 violate this para. of the law.

These inscriptions do not correspond to the real commercial conditions, for it is a notorious fact, as was stated above, that the bitter waters of Saxlehner are those which since 1863 are sold under the denomination of Hunyadi bitter water.

It is also a notorious fact which I have duly stated that in spite of all the efforts of the competitors, it has always remained an un-

altered public persuasion that the name "Hunyadi" or
474 "Hunyadi János" used as a denomination of goods for Buda bitter water is the property of the plaintiff under a title originally acquired before anybody else, and since then continually defended against all attacks.

But these inscriptions are also apt to mislead the public, because they are not only identical with the name of Saxlehner's water, but they are misleading the consuming public also by calling the goods "new" which has the direct meaning that no other article but one identical with the old one is offered under a similar name, and as to the English inscription "Natural Hunyadi water" on the trade-mark it does not even contain the word "Uj" (new) which the defendants allege to have a distinguishing effect, while the connection of the word "natural" with "Hunyadi" is directly meant to discredit the old water as not natural in the eyes of the consuming public.

That argument of the defendants that in the sense of para. 5 of the IInd law of the year 1890 they were entitled to use in their verbal and illustrated trade-marks the name of "Hunyadi" because this word forms an integral part of the company's firm's name could likewise not be taken into consideration. In the sense of the legal disposition mentioned by the defendants everybody is entitled to use his own name or firm name also in a shortened way without other peoples' registered trade-marks containing similar letters or words being able to prevent this use. This disposition of the law however only excludes the protection of the trade-marks in the case where the proprietor of the respective name or the respective firm name has already existed in the market of production as a legal person previously to the registration of the similar trade-mark, but this legal disposition can in no case be understood in such a way that it is allowed to make a firm name for the denomination of a business or of an article which has already been registered or
475 existing, as is the case in the present instance, just the same as nobody is allowed to alter his name into the name of the business or of the goods of somebody else with a view of promoting in this way the credit and the ready sale of his own competing goods. Such a proceeding is not in accordance with but merely aiming at the evasion of the verbal meaning of the law, a proceeding which the law that has created the institution of trade-marks for distinguishing and protecting mercantile articles from similar goods not only does not encourage but decidedly condemns in its whole spirit and purpose, and the tenth article of which even most decidedly prohibits, without which article the fifth article of the same law created for the protection of the "*bona fide*" proprietors of the firm name and name would only leave a large space open for the most scandalous frauds.

With regard to the interpretation of para. 10 the argument of the defendants could not be accepted alleging that as the name "Hunyadi János," or generally the name "Hunyadi," forms neither the mercantile name, nor the firm name, the arms, or the denomination of the business of the plaintiffs, this denomination could without

any legal prejudice be used also by others because although the name "Hunyadi" is neither the name, nor the firm name, nor the arms of the firm Saxlehner, nevertheless it is beyond any doubt that this name has been from the beginning a denomination of its bitter-water business so generally in use, that the protection of para. 10 and 24 cannot be denied to it on the ground that this mercantile name has not been entered as such in the register of commercial firms or in other registers, because in making a distinction between commercial names, firm names and arms on the one side, and the business designation on the other side, the law clearly implies that the business designation is something which is different from the commercial name and firm name.

476 What is to be considered as this business designation in the present case can be stated without difficulty, when we know, that the firm of Saxlehner has for thirty years been the proprietor of the "Hunyadi János" bitter-water spring of Buda as its business (settlement—establishment) and its title to this business designation cannot be denied to it for the reason that the same has not been registered as such in the register of commercial firms, as there is neither a law nor a regulation according to which the business designation as such should be specially registered.

But apart from this name "Hunyadi" forms the plaintiff's trade-mark, the most characteristic component part of her trade-marks. The Budapest chamber of commerce and industry has stated not only the fact that the plaintiff's firm has first used the name "Hunyadi" for bitter waters and that it has opened under this name already in the year 1863 a spring and an establishment; but this chamber has also stated that the plaintiff's firm was the first to register a trade-mark under this name. Consequently the plaintiff's firm is also entitled on this basis to the protection afforded in paras. 23 and 25 of the IInd law of the year 1890 because this protection would be due to it even in case (para. 6 of the II law of the year 1890) the name of the business had not been registered as a trade-mark, and by virtue of para. 25 it is due to it also against such imitations which contain, though with some modification, similar denominations and as such might mislead the customary buyer.

This legal state of things can by no means be affected by the fact that also other bitter-water proprietors have used the name "Hunyadi" with more or less success during a longer or shorter period, and that in face of these imitations the proceedings of the authorities have not always been uniform and consistent. Decisions delivered in concrete cases cannot serve as a generally binding rule for all times and in judging on the bearing of such decisions,

477 one must always reckon with legal foundations and the objects of the legislature, which in respect of a certain circle of judicial relations are designated as decisive. The XLI law of the year 1895 and its motives have designated in an unmistakable manner the direction for the trade-mark jurisdiction and the whole spirit of this law particularly para. 3 of the same without containing a material juridical thesis gives for the proceedings and the conduct

to be observed by the trade-mark judge the direction that he should grant to those who are entitled, protection against any such imitation, which would mislead the common buyer. The trade-mark forming the subject of these proceedings, while avoiding as much as possible exterior figural similarity, yet with respect to the designation of the article evidently aims at identifying itself with the Hunyadi bitter water, and at securing for itself, by means of using this name, that commercial position which the Hunyadi water has gained in the trade for thirty years. If contrary to this, according to the defendant's own assertion, the use of the denomination "Hunyadi" in connection with their own trade-mark would be quite worthless and accidental, nothing can prevent the defendant's firm from dropping this worthless and merely accidental denomination as soon as it has gained the conviction by the complaint that, this denomination which is for it valueless and accidental, may prejudice the legitimate interests of somebody else. The right of a free denomination of the springs and of the free choice of the firm name cannot be profited by for the purpose of exercising this liberty to the prejudice and to the peril of others.

Such acts as are prejudicial, according to the requirements of the ordinary conception of law, ought to be avoided, even if they were not prohibited by any positive law. If nevertheless the defendant's firm, as appears from its written defence, does attach an importance to the use of the name "Hunyadi," it attributes to this use
478 such a commercial importance as in itself motivates the present complaint and makes it a duty for the trade-mark authority to weigh the matter according to the severity of the law. In accordance with the above legal point of view the claim of the plaintiff's firm had to be stated according to section 4 of para. 3 as well as paras. 10, 23, 25 of the II law of the year 1890, and the cancellation of the trade-mark Nr. 3132 had to be declared, because the defendant's firm is not right in saying that para. 5 of the II law of the year 1890 entitled it to the use of the name "Hunyadi" as a trade-mark on the ground that this denomination is a part of the firm name of the defendant's limited company, not even if, in the case of the juridical interpretation maintained by the defendants, the above-cited para. 5 would be taken in quite an absolute sense and independent of all association, because this para. 5 of the law, even in the case of such an interpretation, would entitle the defendants to use its own firm name wholly or in an abbreviated form, but even this article does not expressly entitle it to use the name "Hunyadi," which forms the plaintiff's trade-mark as its own trade-mark with the meaning described in para. 1 and 11 of the II law of the year 1890.

Also that argument has no weight that the trade-mark court cannot on the ground of the laws for trade-marks cancel the name of a firm, which the tribunal of commerce has registered as a firm name under legal forms.

Without regard to the fact that the cancellation of the trade-mark in question does not prevent the defendants at all from using also in future their registered firm name as a firm name under the

protection of the mercantile law, and in the sense of para. 5 of the II law of 1890 I must declare, in consequence of the general importance of the question, that the court of trade-marks can decide upon any question only according to the law on trade-marks, and can so much the less regard the decisions delivered by the
479 tribunals of commerce in matters regarding registration of firms as giving guidance for itself, because the criterions applicable to the signature, choice and usurpation of firm names fall within a totally different point of view, not to be identified with the principles to be followed in matters of trade-marks, so that from the fact that the tribunal of commerce, according to its own point of view, has in some cases registered certain chosen firm names without hesitation, or has not complied with certain requests for cancellation, it does not follow at all that the style of the firm not objected to by the tribunal of commerce should now also be recognized as legitimate with respect to the trade-mark legislation. The tribunal of commerce fully satisfies its legal task in stating that, according to the registry of commercial firms, a firm does not exist under the same or similar style, and does not care what trade-marks claiming protection are contained in the trade-mark registers. The tribunal of commerce cannot be blamed on that ground, but on the other hand, one cannot demand that the trade-mark judge should apply to himself for his own guidance the decision of the tribunal of commerce, even if it be from its own point of view entirely inobjectionable.

For all these reasons all of the trade marks of the defendant's firm which were objected to had to be cancelled.

The costs were adjudged in favour of the plaintiff according to the amount of net expenses actually incurred.

Budapest, the 25th August, 1896.

DÁNIEL.

480 COMPLAINANT'S EXHIBIT HUNYADI LAJOS DECREE. J. A. S., Ex'r. March 31, 1898.

Royal Hungarian
minister of commerce.
No. 38043
1896.

Andor Saxlehner, Esq., as attorney of Mrs. Emily Pelikán, widow of Andreas Saxlehner, proprietor of the firm Andreas Saxlehner.

BUDAPEST, *VI. Andrássy-út* 3.

Upon the complaint raised by Andor Saxlehner of Budapest as representative of Mrs. Emily Pelikán, widow of Andreas Saxlehner proprietor of the Budapest firm "Andreas Saxlehner" against Louis Schmidthauer, of Komárom, chemist, with a view of cancelling certain trade-marks and having consulted in this matter the Györ chamber of commerce and industry and also the senate of trade-marks I hereby order the cancelling of the following trade-

marks registered with the Győr chamber of commerce and industry, to wit:

1. The illustrated trade-mark called "Radetzky" registered on the 5th of December 1892 sub No. 19 for the defendant, and

2. The illustrated trade-mark called "Hunyadi Lajos" registered on the 16th of July 1894 sub No. 37.

The defendant is condemned to pay to the plaintiff according to § 6 of the XLI law of the year 1895 the sum of 35 florins, being the ready-money expenses caused by the action and the legal representation.

Motives.

481 The illustrated trade-mark registered for the defendant on the 5th of December 1892 sub No. 19, as more closely specified in the dispositive part of the present decision, had to be cancelled, for although it is evident that the proprietor of the trade-mark endeavoured to produce some difference on his trade-mark, yet the form of the trade-mark, its division into threefold fields, the colouring of the middle field, the diagonal printing in identical colours on the two outer fields are all apt to mislead the ordinary purchaser.

The objection of the defendant that with regard to the trade-mark in question there has already on one occasion a decision been brought to the effect that it is to be kept further valid, could not be taken into consideration, because in questions decided by administrative authorities there may still be room for revision, there being no regulation or law preventing new complaints from being fully examined and because the more strict principle of the XLI law of the year 1895 is devolving the duty on the trade-mark authority not to eschew revision in the case of renewed complaints.

Finally the illustrated trade-mark registered for the defendant on the 16th of July 1894 sub No. 37 had also to be cancelled because this, by its form, its division into threefold fields, its colouring showing a very slight difference, and principally by the use of the name of "Hunyady" that is an inscription prohibited according to article 4 of the § 3 of the II law of the year 1890 is to a large extent apt to mislead the consuming public, on the other hand the use of the name "Hunyady" is prejudicing the rights acquired by the plaintiff on the ground of § 10 of the law above quoted.

For all these reasons all of the trade-marks of defendant which were objected to had to be cancelled.

The costs were adjudged in favour of the plaintiff according to the amount of net expenses actually incurred.

Budapest, the 9th of October, 1896.

DÁNIEL.

482 COMPLAINANT'S EXHIBIT PHILLIPS LETTER TO BRIESEN & KNAUTH. Eugene Mackey, Commissioner.

J. E. Phillips, druggist, Exchange block, No. 40 West Spring street.

TITUSVILLE, PA., *Nov.* 12, 1896.

Messrs. Briesen & Knauth, New York.

GENTLEMEN: Your "caution" circular, referring to Hunyadi water just received. It is to be regretted that this circular was not sent out ten days earlier. A party representing Eisner & Mendelson Co. was here soliciting orders for "Hunyadi Matyas water," and by representing that the Hunyadi Janos water had been taken off the market, that the bottling of it had been discontinued, he obtained my order for a case of the Matyas water. He was a very plausible fellow and said Hunyadi Janos was worth a premium as none of it could be obtained after the stock in the hands of jobbers had been exhausted. He sold the water to two other parties here and I presume he takes orders wherever he goes. I have written Eisner & Mendelson that I should hold the goods subject to their order.

Yours truly,

J. E. PHILLIPS.

483 COMPLAINANT'S EXHIBIT HUNGARIAN CERTIFICATE AS TO WORD REGISTRATIONS. March 31, 1898. J. A. S., Ex'r.

Translated from Hungarian.

The Budapest chamber of commerce and industry.

No. 3832/1898.

Certificate.

The undersigned chamber of commerce and industry hereby certify upon request of Mrs. Emily Pelikan widow of the late Andreas Saxlehner, as proprietor of the firm "Andreas Saxlehner" that, on basis of treaty existing between the Austro-Hungarian monarchy and the United States of North America and incorporated in Hungary by act XIV of the year 1872, the citizens of the United States of North America were permitted to have registered verbal trademarks in Hungary before the time when act XLI of the year 1895 became valid, that is to say previously to the second day of August, 1895, and that these verbal trade-marks were legally protected, whereas previously to the 2nd day of August 1895 Hungarian citizens could not obtain protection for their verbal trade-marks.

Budapest the 12th March 1898.

THE BUDAPEST CHAMBER OF COMMERCE AND INDUSTRY.

(Signed) HÜTTL, *Vice-President.*

(Signed) FRITZ PETER, *Secretary.*

[L. S.]

Stamp.
1 fl.
No. 79/1898.

484 I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest the 16th of March 1898.

[SEAL.] IVÁN BOSÁNYI, LL.D.,
Sworn Interpreter.

(Duly authenticated.)

COMPLAINANT'S EXHIBIT COMPLAINT AGAINST IGNATIUS UNGAR & SON. March 31, 1898. J. A. S., Ex'r.

Translation.

To His Excellency Pela Lukacs, M. P., royal Hungarian minister of commerce, &c., &c.:

A humble complaint by Andor Saxlehner (of 3 Andrassyut, Budapest 6), as attorney of Mrs. Emily Pelikan, widow of Andreas Saxlehner, proprietress of the Budapest registered firm of Andreas Saxlehner (of 3 Andrassy-ut, Budapest 6), represented by Dr. Julius Grauer, lawyer (of 22 Nagy Koronautcza, Budapest, 5) against the Budapest registered firm Ignatius Ungar & Son, bitter-water producers and merchants (into the hands of Mr. Ignatius Ungar or Mr. Mayer Nicolas Ungar, members of the firm) of 23 Lipot-Korut, Budapest 5).

On the ground of the second law of the year 1890 with enclosures. First copy.

Your Excellency, the trade-marks annexed to the certificate enclosed herewith sub $\frac{A}{5}$ by the Budapest chamber of commerce and industry were registered on December 12, 1873, for my late husband Andreas Saxlehner sub No. 10, and were entered for me in the new trade-mark register on the ground of the second
485 law of the year 1890 sub running registry Nos. 121 and 122.

Here follows description of further trade-marks.

* * * * * * *

All these trade-marks were registered for the legal protection of the Hunyadi Janos Buda bitter water.

* * * * * * *

The bitter water brought into commerce by my late husband under the denomination Hunyadi Janos having attained to great popularity and secured a good sale, there commenced by defendant the imitation of the Hunyadi Janos trade-mark as well as the unlawful use of the denomination of my establishment, business enterprise and merchandise.

According to paragraph 33 of the second law of the year 1890 the trade-marks "registered in accordance with the rules existing hitherto" do and can enjoy protection only in virtue of the dispositions of the second law of the year 1890, as is particularly pointed out in principle in alinea 4 of the decree No. $\frac{7023}{VI}$ of his excellency the royal Hungarian minister of commerce dated February 15, 1891.

Alinea (*e*) of paragraph 21 and paragraph 29 of the second law

of the year 1890 on the protection of the trade-marks place all questions "as to the existence of the right to the use of a trade-mark" and "as to the right to the use of a trade-mark as well as the priority of such right" respectively under Your Excellency's exclusive jurisdiction, that is to say, the existence of any right in matters of trade-marks and of denomination of merchandise, as well as any transgression of such rights, forms exclusively the subject of Your Excellency's high decisions, as is pointed out in the No. 17662 dated May 16, 1890, of his excellency the royal Hungarian minister of justice.

Considering that in virtue of the second law of the year 1890 all trade-marks registered or unregistered enjoy so much and such protection as is afforded by the said law; considering that the
486 dispositions of the second law of the year 1890 have to be applied to all trade-marks which during the validity of the former law on trade-marks were registered or were not registered at all, it is beyond doubt thought my present humble complaint is lawfully based on the second law of the year 1890.

The Budapest firm Ignatius Ungar & Son had on May 25, 1891, the trade-mark "Rakoczy Gyorgy" No. 625 annexed to the certificate enclosed sub $\frac{V}{3}$, on July 20, 1891, the trade-mark "Hunyadi Arpad" No. 647 annexed to the certificate enclosed sub $\frac{X}{6}$, on July 20, 1891, the trade-mark "Victoria" No. 652 annexed to the certificate enclosed sub $\frac{X}{5}$, registered with the Budapest chamber of commerce and industry, for the protection of their bitter water.

* * * * * * *

All these trade-marks are imitations particularly apt to be confounded with and mistaken for the trade-marks $\frac{A\,B\,B}{S\,E\,S}$ and $\frac{K}{S}$ and previously registered for me. All elements of my trade-marks, the coloring, division, composition, the general design of my trade-marks and the general effect of such general design are imitated in a manner particularly apt to mislead, whereas according to paragraph 1 of the second law of the year 1890 the object of the trade-mark is not the confounding of goods, nor the misleading of the public, but to distinguish securely, rapidly and strikingly one merchandise from another similar merchandise and to totally exclude the possibility of mistake and confusion.

* * * * * * *

(Signed) ANDOR SAXLEHNER,
M. P., as Attorney of Mrs. Emily Pelikan, Widow of Andreas Saxlehner, Proprietress of the Budapest Registered Firm Andreas Saxlehner.

(Duly authenticated.)

487 COMPLAINANT'S EXHIBIT COMPLAINT AGAINST IGNATZ UNGAR. March 31, 1898. J. A. S., Ex'r.

This complaint against Ignatius Ungar individually is in form similar to the complaint of the same complainant against the firm of Ignatius Ungar & Son, and covers 19 pages, the marks complained of being "Hunyadi Arpad," "Victoria," "Hunyadi Bela."

488 UNITED STATES PATENT OFFICE.

ANDREAS SAXLEHNER, of Buda-Pesth, Austria-Hungary.

Trade-mark for Natural Aperient Water.

Statement and declaration of trade-mark No. 14252, registered April 5, 1887. Application filed November 12, 1886.

Statement.

To all whom it may concern:

Be it known that I, Andreas Saxlehner, a subject of the Emperor of Austria-Hungary, residing at Buda-Pesth, in Hungary, and doing business at said Buda-Pesth, have adopted for my use a trade-mark for natural aperient water, of which the following is a full, clear, and exact specification.

The trade-mark that is the subject of the application in connection with which this specification or statement is made consists of the word-symbol "Hunyadi." It has generally been applied in the form and manner shown in the accompanying fac-simile.

(Here follows diagram marked p. 489.)

The trade-mark—to wit, the word-symbol "Hunyadi"—has been displayed at the top or upper field of the label, followed by the word "János," so as to form together with this word the uppermost line of the label. Below this uppermost line are placed the words "Budai Keserüviz Forrás," below which has been placed a medallion showing the head of a knight with helmet removed, with scroll-work upon either side of the medallion. Immediately under the medallion the word-symbol "Hunyadi," accompanied by the word "János," has been repeated. The ground or field of the label has been red, the letters and medallion and ornamentation being in blue and black, or white and black, the whole disposed and arranged as shown in the accompanying fac-simile aforesaid. The color both of the ground and of the inscription may, however, be varied at will, and the disposition of the parts modified.

The trade-mark consists, essentially, of the said word-symbol "Hunyadi," without regard to any one or more of the parts and features aforesaid in connection with which it has been used.

It is not to be understood from the foregoing that I in anywise curtail, relinquish, waive, or abridge my right to the exclusive use of the said medallion, the label as a whole, or to any one or more of the parts or features aforesaid, the distinctions hereinbefore recited being made only to the end that the particular trade-mark sought to be protected hereby may be clearly understood.

The said trade-mark I have used continuously in my business since March 15, 1863.

The class of merchandise to which this trade-mark is appropri-

TRADE-MARK.

A. SAXLEHNER.

NATURAL APERIENT WATER.

No. 14,252. Registered Apr. 5, 1887.

Nos. 712-715
Saxlehner
v.
Eisner-Mendelsohn
et al
$ 489

Witnesses
W. E. Boulter
Wm. R. Davis

Proprietor,
Andreas Saxlehner
per Henry Orth
his attorney

ated is mineral water, and the particular description of goods comprised in said class upon which I use it is natural aperient water. It has been printed in the form and manner hereinbefore set forth upon paper labels, which have been attached to the bottles in which the water has been put upon the market. I intend to use it in every lawful manner at will, as may appear to be expedient.

ANDREAS SAXLEHNER.

Witnesses:

PAT ROVIES SURY.
WILLIAM MÁRIÁSSY.

Declaration.

BUDA-PESTH, *Germany*, } ss:

Andreas Saxlehner, being duly affirmed, deposes and says that he is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by him in commerce between the United States and foreign nations or Indian tribes, and particularly with Austria-Hungary, Germany, and Great Britain, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ANDREAS SAXLEHNER.

Affirmed and subscribed before me this 21st day of February, 1887.

[L. S.]

HENRY STERN,
U. S. Consul at Buda-Pesth, Hungary.

490 United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
SIEGEL-COOPER COMPANY, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
RUDOLPH GIES, Defendant.

EMILIE SAXLEHNER, Complainant,
vs.
LOUIS MARQUET, Defendant.

} In Equity.

491 Proofs of final hearing in the above-entitled suits, taken on the part of the defendant before John A. Shields, Esq., an examiner of this court, pursuant to notice, at the office of Charles G. Coe, Esq., defendant's solicitor, Temple court, New York city, on Friday, February 4th, 1898, at 11 a. m.

Appearances.

Antonio Knauth, Esq., counsel for complainant.
Charles G. Coe, counsel for defendant.

MORITZ EISNER, as a witness on the part of the defendants, having been duly sworn, deposes and says as follows, to wit:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. My name is Moritz Eisner; age forty-seven; residence, 42 West 87th street, New York city; occupation, I am president and manager of the Eisner & Mendelson Company.

Q. 2. Is the Eisner & Mendelson Company you have just referred to the defendant corporation in the suit of Emilie Saxlehner vs. Eisner & Mendelson Company?

A. Yes, sir.

Q. 3. Please state in what capacity you are connected with said defendant corporation?

A. I am the president of said corporation and have formerly been its secretary since its incorporation, and also the manager and a director of said company.

Q. 4. Said defendant corporation was organized under the laws of the State of West Virginia, on April 13th, 1892, was it not?

A. The corporation was organized on or about April 13th, 1892.

Q. 5. Did the West Virginia corporation succeed to the rights, privileges, etc., of any other previous corporation of the same name, and if so, what corporation?

A. The corporation incorporated under the State laws of West Virginia succeeded to the business, rights, privileges, contracts and all the business formerly owned by the Eisner & Mendelson
492 Company, incorporated under the State laws of Pennsylvania, and also to all its liabilities.

Q. 6. Please state as near as you can, when said Pennsylvania corporation was organized?

A. The Pennsylvania corporation was organized about the year 1886.

Q. 7. What is the business of the defendant corporation herein, Eisner & Mendelson Company, and what was the business of said Pennsylvania corporation, its predecessor?

A. The business was and is importing and exporting mineral waters and other goods in the drug line. The Pennsylvania corporation also used to do some manufacturing in the State of Pennsylvania, which, however, was given up by the West Virginia corporation.

Q 8. Can you state briefly what mineral waters and what other articles the said corporations have in the past imported and sold, or sold?

A. The Eisner & Mendelson Company are the agents for the Carlsbad mineral springs; for the Giesshuebler springs; they were up till lately the agents for the French Government vichy; and are the sole agents for Johann Hoff's malt extract, and other numerous mineral waters of small importance.

Q. 9. Please state in what capacity you were connected with the said Pennsylvania corporation, the predecessor of the present corporation?

A. I was the secretary and manager of said corporatior, and a director from the incorporation until its business was merged in the present corporation.

Q. 10. Please state whether said Pennsylvania corporation and yourself, as its officer and director, was ever connected with the importation and sale in the United States of Hungarian bitter waters, and, if so, please state how and under what circumstances you became connected with the importation and sale of said waters in the United States?

A. When we acquired the agency for the Giesshuebler waters, which is owned by Heinrich Mattoni, this gentlemen requested us also to take the sale for his Hungarian bitter-water springs,
493 for which he was the sole owner at Buda-Pesth, under the firm name of Mattoni & Wille. We heretofore had not paid very much attention to the sale of Hungarian bitter waters, and I was not sufficiently familiar at the time to say which one of his numerous springs would find a sale in the United States, and because he told me that there was some trouble that his former agent in New York had had, Mr. Andreas, I made a preliminary contract with him for the sale of his Hungarian bitter-spring waters for the

United States, which covered all his springs, until we could determine which one we would take hold of. This contract was made about the year 1889 in writing, until I could sufficiently look into the matter upon my return. I went with him to Buda-Pesth to look over the field and, if possible, to get the papers pertaining to a lawsuit which the former owner of the springs had with Andreas Saxlehner at Buda-Pesth. As I could not wait long enough to obtain said papers, I requested his manager at Buda-Pesth to send all those papers pertaining thereto to New York, and in the meantime we would import the Royal Hungarian bitter water.

Q. 11. Can you produce the contract of 1889 which you have just referred to?

A. I do so.

Counsel for defendant offers in evidence a copy in the German language of the said contract referred to by the witness, which contract is dated July 30, 1889, and the same is marked "Def't's Exhibit Mattoni 1889 Contract."

It is hereby stipulated on the record that the copy may be marked as above in evidence in lieu of the original contract, subject, however, to comparison by complainant's counsel with the original contract, and to any objections thereto to be made at the next session.

Counsel for defendant also offers in evidence a translation in the English language of said 1889 contract, and it is marked
494 "Def't's Exhibit Mattoni 1889 Contract, English Translation."

The same stipulation applies also to this exhibit.

Q. 12. Please state what was done by the Eisner & Mendelson Company of Pennsylvania under this contract of July 30, 1889?

A. We imported some small quantities of the Hungarian bitter water, and upon my return here, I investigated the matter more closely in reference to the Hunyadi Matyas spring, what litigation there had been here in reference thereto, and what other Hunyadi waters were on the market here, and I found that the agents for the Hunyadi Janos spring, the agents for Andreas Saxlehner, had applied for an injunction against Andreas, the former agent for Mattoni in this country in or about the year 1888.

Complainant's counsel objects to the term "agent" as applied to the pretended agent of Andreas Saxlehner as incompetent evidence of such agency.

(Witness continuing:) And that the agents for Andreas Saxlehner, or such it was presumed to be, had obtained an injunction which was afterwards dismissed.

Complainant's counsel makes the same objection, and objects to the last statement also on the ground of incompetency.

(Witness continuing:) That also the agents for Andreas Saxlehner had applied for an injunction against the Hunyadi Arpad water and had obtained said injunction, which was also afterwards dis-

missed, either in the fall of 1888 or in the spring of 1889, or thereabouts.

Same objection.

(Witness continuing:) That the Hunyadi Arpad was sell-
495 ing largely on this market; that the Hunyadi Bela was on the market, and, I believe, the Hunyadi Laszlo was also selling at that time. I also received copies of papers from Buda-Pesth referring to a suit which had been brought by Andreas Saxlehner against the former owners of the Hunyadi Matyas spring at Buda-Pesth, wherein they had applied for the cancellation of the trade-mark Hunyadi Matyas, and were defeated.

Objected to as incompetent.

(Witness continuing:) Said suit in Buda Pesth was brought on or about the year 1873, and after looking over all these matters and taking proper counsel, we determined to introduce the Hunyadi Matyas spring water, and after some correspondence with Mr. Mattoni, the owner of said spring, we made a lease in 1890, provisionally for five years, and at our option to be renewed for a further period of twenty years longer. At the time we made this lease, the agents of Andreas Saxlehner advertised largely in the city of New York, and all over the United States that there were various Hunyadis on the market.

The last sentence is objected to as incompetent.

(Witness continuing:) And that the Janos will hereafter be distinguished from all the other Hunyadis by a red diamond, a trade-mark of the Apollinaris Company, Limited, who were the agents for Andreas Saxlehner.

Q. 13. Was the lease you have referred to as made in the year 1890, in writing?

A. Yes, sir.

Q. 14. Was it in the German language?

A. It was made in the German language.

Q. 15. Can you produce such lease?

A. I do produce it.

Counsel for defendant offers in evidence a copy of the said lease,
496 which is dated on or about March 14, 1890, in the German language, and it is marked "Def't's Exhibit Mattoni Hunyadi Matyas Lease."

It is stipulated that the foregoing copy is received in lieu of and subject to correction by the original, and subject to any objection which may be made at the next session.

Counsel for defendant offers in evidence an English translation of said lease of March 14, 1890, and the same is marked "Def't's Exhibit Mattoni Hunyadi Matyas Lease, English Translation."

The same stipulation applies also to this exhibit.

Q. 16. You have spoken in your last answer with reference to some litigation between Andreas Saxlehner, the owner of the Hun-

yadi Janos spring, and the owner of the Hunyadi Matyas spring. Who was the owner of said Hunyadi Matyas spring previous to Heinrich Mattoni?

Objected to as incompetent.

A. Ignatius Markus.

Q. 17. You have also referred in said answer to the litigation between such former owner and Andreas Saxlehner, as occurring in the year 1873. Can you produce a certified copy of the decision of the court setting forth such 1873 decision?

Same objection.

A. I herewith produce it as I received it, in the Hungarian and English language, bound together.

Q. 18. How long have you had this paper which you produce in your possession?

A. It must be eight years.

Q. 19. I see that in the English translation of this paper, it is stated as given under the hand and seal of the consulate the 11th day of December, 1889. Was it soon after this date that you received such paper?

A. Shortly after that that we received it by mail.

497 Q. 20. And as I understand you, this original paper containing the decision in the Hungarian language, and the translation thereof as shown has been in your possession ever since?

A. Yes, sir.

Counsel for defendant offers in evidence the certified copy produced by the witness and the translation thereof bound together, as produced by him, and the same is marked "Def't's Exhibit 1873 Hungarian Decision."

Objection to as immaterial, irrelevant and incompetent.

Q. 21. You have spoken in your previous answers of various other papers which you received from Heinrich Mattoni between the time of your entering into the first contract of July 30, 1889, and the time when you entered into the lease of March 14, 1890, of the Hunyadi Matyas spring: Can you produce the other Hungarian papers which you so received at or about that time, and before entering into the March 14, 1890, lease, and if so, please do so.

A. I received the registry of the trade-mark of July 6, 1877, which was renewed on the acquirement of the ownership of the Hunyadi Matyas spring by Heinrich Mattoni on the 29th of August, 1887, for the Hunyadi Matyas trade-mark registered at Budapesth, which I herewith produce.

Counsel for defendant offers in evidence the certified copies so produced by the witness, and it is marked "Def't's Exhibit Hunyadi Matyas 1877 Trade-mark."

The exhibit is objected to as incompetent, immaterial and irrelevant.

(Witness continuing:) I afterwards, probably a year afterwards,

received the copy of the registry of the Hunyadi Arpad trade-mark which was also registered at Budapesth at the time by Ignatz Ungar, the owner of said spring, which I herewith produce.

498 Defendant's counsel offers said Hunyadi Arpad trade-mark in evidence, and the same is marked "Def't's Exhibit Hunyadi Arpad Hungarian Trade-mark."

Same objection.

(Witness continuing:) At the same time, in 1890, I received a copy of the registry of the trade-mark of Andreas Saxlehner which I herewith produce.

Defendant's counsel offers in evidence the said trade-mark produced by the witness and it is marked "Def't's Exhibit Hunyadi Janos Trade-mark."

Adjourned to Monday, Feb. 7, 1898, at 2 p. m.

SAXLEHNER
vs.
EISNER & MENDELSON CO.

NEW YORK, *February* 7, 1898.

Met pursuant to adjournment.

Appearances: Mr. Knauth for complainant; Mr. Coe for defendants.

Adjourned to February 9, 1898, at 11 o'clock a. m.

SAXLEHNER
v.
EISNER & MENDELSON CO.

NEW YORK, *February* 9, 1898.

Met pursuant to adjournment.

Appearances: Mr. Knauth for complainant; Mr. Coe for defendants.

MORITZ EISNER—direct examination continued:

Mr. Knauth, complainant's counsel, objects to Defendant's Exhibit Hunyadi Matyas 1877 Trade-mark, as incompetent and inadmissible and immaterial, because, first, it does not
499 emanate from the chamber of commerce and industry, bears neither its seal nor signature of any official, is not duly authenticated or certified, but is merely a paper signed by Dr. Weiser Karoly, a sworn interpreter; also, second, because the four trade-marks for the springs "Szechenyi," "Deak," "Szdstvan" and "Hunyadi Matyas," stated to be annexed to the exhibit, are not in fact annexed thereto, and do not appear in any manner; also, third, because there is pasted onto this paper an advertising sheet of "Mattoni's Ofner Bitterwasser," and on the back thereof a fanciful picture of a label which is not referred to in Dr. Weiser Karoly's statement or certificate, and by being pasted onto the

latter is misleading and improper; fourth, because there is an informal memorandum not signed or authenticated, attached to Dr. Weiser Karoly's statement, to the effect that the first registration of the Hunyadi Matyas mark was re-registered in 1887.

Complainant's counsel also objects to Defendant's Exhibit Hunyady Arpad Hungarian Trade-mark, upon the ground that the same is immaterial, irrelevant and incompetent; also because the same is not legally authenticated, and further, because there is attached to it a memorandum not signed or certified and not a part of the certificate, in the German language.

Complainant's counsel also objects to "Defendant's Exhibit 1873 Hungarian Decision," upon the ground that the same is incompetent and because not certified, signed, sealed or authenticated except by an interpreter, and because the same does not appear to be any original certificate; further, because the translation into English of said Hungarian paper is not correct; also, because there is attached to said exhibit a memorandum or statement in the
500 German language relating to the matters of the exhibit, which statement is not signed or authenticated in any manner.

Complainant's counsel gives notice that at the hearing he will contend that no facts are proven by the foregoing exhibits except the fact that the witness Eisner obtained such papers, as testified to by him.

By Mr. COE:

Q. 22. You have said in your previous examination that the Hunyadi Janos advertised that there were various Hunyadis in the market. Please state what advertisement you especially refer to, and if you have the same, please produce it and explain about it.

A. I referred to the advertisement that appeared in 1889 in the Medical Record and Druggists' Circular as well as in other medical papers. I saved the Medical Record advertisement of April 6, 1889.

Q. 23. Please state what kind of a paper the Medical Record is as to its reputation, whether a weekly or monthly periodical, and as to the extent of its circulation.

Mr. KNAUTH: Objected to as incompetent, immaterial and irrelevant.

A. The Medical Record is considered the best medical journal in the United States. It is a weekly publication, and the publishers claim that it circulates among ten thousand physicians a week.

Mr. KNAUTH: Objected to as incompetent.

A. (continued). From my own experience as an advertiser, I know that the Medical Record reaches the best class of physicians in the United States.

Same objection.

Q. 24. This advertisement of April 6, 1889, in the Medical

Record has been in your possession ever since its publication, has it not?

A. Yes, sir.

501 Mr. COE: Counsel for defendant offers in evidence the advertisement of April 6, 1889, from the Medical Record, being page 19 of that issue, and the same is marked "Defendant's Exhibit Apollinaris Hunyadi Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Objected to as incompetent, no connection with the complainant or her predecessor in business being shown, and no proper proof of the publication having been made.

Q. 25. State whether or not a like advertisement appeared in other issues of the Medical Record, and if so, whether you have caused a list of the dates and issues of the Medical Record in which such similar advertisement appeared, to be made under your supervision, and if so, please give the dates of the issues of the said Medical Record in which the same advertisement appeared?

Mr. KNAUTH: Objected to as incompetent.

A. I have caused a search to be made by one of my employés, and he went over the files of the Medical Record and prepared a list stating the dates on which the same advertisement appeared in the Medical Record. The dates are as follows: April 6, 1889, April 20, 1889, May 4, 1889, May 18, 1889, June 1, 1889, June 15, 1889, June 29, 1889, July 13, 1889, July 27, 1889, August 10, 1889, August 24, 1889, September 7, 1889, September 21, 1889, October 5, 1889, October 19, 1889, November 2, 1889, November 16, 1889, November 30, 1889, December 14, 1889, December 28, 1889, January 11, 1890, January 25, 1890, February 8, 1890, February 22, 1890, March 8, 1890, March 22, 1890, April 5, 1890, April 19, 1890, May 3, 1890, May 17, 1890, May 31, 1890, June 16, 1890, June 28, 1890, July 26, 1890, August 9, 1890, August 23, 1890, September 6, 1890, September 20, 1890, October 4, 1890, October 18, 1890, November 1, 1890, November 15, 1890, November 29, 1890, December 13, 1890,
502 December 27, 1890. He did not look any further for this copy than January 1, 1891.

Q. 26. You have stated in your previous testimony that you made your first contract with Mattoni, the then owner or proprietor of the Hunyadi Matyas spring, July 30, 1889. Between this date and the time when you made your lease contract, on March 14, 1890, did the Eisner & Mendelson Company of Pennsylvania import and sell Hunyadi Matyas water?

A. No, sir.

Q. 27. Why not?

A. Because we wanted to look into the question carefully and see what other Hunyadi waters were selling here, how they were selling, what the litigation has been, and, in fact, in every manner satisfy ourselves as to the market of Hunyadi and whether the name was generic or not.

Q. 28. When you speak of litigation in your last answer, do you

mean to include the litigation and the state of the name "Hunyadi" in Hungaria as well as the United States?

A. I do. I knew as a fact then that all the Hunyadis were sell- in Hungaria, in Austria, in fact all over the continent. I have been personally familiar with the Hunyadi Matyas since 1878—the fall of 1878, when it was first brought to my notice.

Q. 29. Your lease, or the lease contract between Mattoni and the Eisner & Mendelson Company of Pennsylvania is dated March 14, 1890. How soon after the execution of said contract did the said company commence to import and sell Hunyadi Matyas water in the United States?

A. Right after the execution of the contract.

Q. 30. What steps did the said company take to make it known to the public of the United States that they were lessees of the Hunyadi Matyas springs? What was the first thing the said company did to give the public such notice?

A. On or about the beginning of May, 1890, we sent a circular letter to the drug and mineral-water trade throughout the United States, notifying them to that effect, and enclosed a circular
503 showing the label of the Hunyadi Matyas water as we commenced to import and sell it, and descriptive of the article.

Q. 31. About how many of those notices and circulars did you send throughout the United States, at or about that time, May 8, 1890?

A. Of this first letter there may have been a few thousand, as that was intended more for the jobbing trade.

Mr. COE: Counsel for defendant offers in evidence the said notice dated May 8, 1890, and the same is marked "Defendant's Exhibit Hunyadi Matyas 1890 Notice No. 1, J. A. S., ex'r."

Mr. KNAUTH: Objected to as immaterial and irrelevant.

Mr. COE: Defendant's counsel further offers in evidence the circular showing the Hunyadi Matyas colored label, and it is marked "Def't's Exhibit Hunyadi Matyas Circular, J. A. S., ex'r."

Same objection.

Q. 32. Did you follow up this circular notice with any other announcements or notices to the trade, and if so when, and can you produce one of such notices?

A. Shortly after that—maybe within a few weeks after that, we sent out the announcement I now produce, also enclosing the label circular like "Def't's Exhibit Hunyadi Matyas Label Circular," to the entire retail drug trade of the United States in all towns over five thousand inhabitants.

Mr. KNAUTH: Objected to as incompetent, not being in the knowledge of the witness.

Q. 33. Please state how many of such notices with the said label circular enclosed you sent out to the best of your knowledge and recollection?

A. To the best of my knowledge and recollection it must have been between forty and fifty thousand.

Counsel for defendants offers in evidence the said notice or
504 announcement produced by witness, and the same is marked "Defendant's Exhibit Hunyadi Matyas Notice No. 2, J. A. S., ex'r."

Same objection.

Q. 34. You have stated in your previous answers that the first notice went especially to the jobbing grocers and jobbing druggists and mineral water dealers in general; and the notice No. 2 went to the retail drug trade; each of said notices being accompanied with the "Defendant's Exhibit Hunyadi Matyas Label Circular." In addition to those notices did you send any special notice, at or about the same time, to the doctors and physicians of the United States, and if so, can you produce such notice you so sent?

A. *On* or about the same time, or shortly thereafter, we sent a letter to the physicians—the Eisner & Mendelson Company of Pennsylvania, sent a letter to physicians in nearly all of the larger cities of the Union, also enclosing a pamphlet same as Defendant's Exhibit Hunyadi Matyas Label Circular, said label circular showing a colored label; and I herewith produce one of the circular letters which we sent to physicians.

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

Counsel for defendant offers in evidence the letter produced by witness, and it is marked "Def't's Exhibit Hunyadi Matyas Physician Letter, J. A. S., ex'r."

Mr. KNAUTH: I will object to that exhibit as irrelevant, immatarial and incompetent.

Q. 35. Please state as nearly as you can now recollect about how many such physicians' letters like "Def't's Exhibit Hunyadi Matyas Physician Letter" were sent to physicians throughout the United States by the Eisner & Mendelson Company.

Mr. KNAUTH: Objected to as immaterial and irrelevant.

505 A. We did not send them out, all of them, at once, but wherever we sold—in whatever city we sold Hunyadi Matyas water, we would sample the physicians; that is we would send this letter with a written order enclosed for a sample bottle on that druggist to whom we sold the water; and in that way they gradually went out; but we must have sent out some ten thousand at least; that is my recollection of it.

Q. 36. And within what period were the larger part of those notices sent out?

A. In 1890, 1891 and 1892.

Q. 37. You have referred, in your previous answer, to the means by which you distributed sample bottles of Hunyadi Matyas water to physicians. About how many of such sample bottles did you so distribute, according to your best recollection?

Same objection.

A. I cannot tell how many were distributed, as we are distributing all the time.

Q. 38. I mean within the period you have referred to, 1890, 1891, 1892, in which you distributed a large number of the notices—the larger number of the said notices?

A. I referred to the number of circulars, because my recollection is that we at least distributed ten thousand sample bottles.

Q. 39. And were these sample bottles your standard size of bottles with your regular Hunyadi Matyas labels on?

A. It was the regular size bottle, with the regular label on.

Q. 40. When you speak of distributing ten thousand sample bottles, you mean during the last seven or eight years, do you not?

A. I do not. I mean during that time—1890, 1891 and 1892.

Q. 41. At or about the time you entered into the Hunyadi Matyas lease with Mattoni, and commenced to import and sell Hunyadi Matyas water in the United States, was there any mention or
506 notices in newspapers in the United States with reference to your becoming lessees of the spring, and if so, can you produce some of said notices, and state in what papers they were inserted and to what extent such notices or similar ones were inserted in papers in the United States?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. On or about June, 1890, I caused to be inserted in the entire list of papers in which we advertised in, a reading notice, notifying the public of our acquirement of said lease.

Mr. KNAUTH: Objected to as incompetent.

A. (continued). We advertised at the time in at least 150 of the most prominent papers in the United States, and the majority of them inserted said notice.

Mr. KNAUTH: Same objection.

A. (continued). I only saved a few of said notices, as they all read alike; one from the Chicago Journal of June 30, 1890, one from the Chicago Herald, July 12, 1890. The same notice appeared in papers like the New York World, Boston Herald, Philadelphia Times, I believe in the Philadelphia Telegraph, the San Francisco Examiner—or in the Chronicle, I cannot recollect which now; in St. Louis papers, and various other papers which I, of course, it being seven or eight years back, cannot recollect now.

Mr. KNAUTH: Same objection.

A. (continued). The notice also appeared in the drug papers, one particularly in the Druggists' Circular of June 30, 1890, which I here produce together with the notice that appeared in the Chicago Journal of June 30, 1890, and Chicago Herald of July 12, 1890.

Mr. KNAUTH: Same objection.

507 Mr. COE: Counsel for defendants offers in evidence notice produced by witness from the Chicago Journal of June 30,

1890, and the same is marked "Defendant's Exhibit Chicago Journal Notice, J. A. S., ex'r."

Mr. KNAUTH: Objected to as incompetent, immaterial, and irrelevant.

Mr. COE: Counsel for defendant also offers in evidence the notice produced by witness from the Chicago Herald of July 12, 1890, and the same is marked "Defendant's Exhibit Chicago Herald Notice, J. A. S., ex'r."

Same objection.

Mr. COE: Defendant's counsel also offers in evidence the notice from the Druggists' Circular, and the same is marked "Defendant's Exhibit Druggists' Circular Notice, J. A. S., ex'r."

Same objection.

Q. 42. In your previous answers you have referred to notices and so forth which you sent out to the wholesale and retail drug trade, to physicians, and also certain statements from the Chicago Journal, Chicago Herald and Druggists' Circular, of your acquiring the lease of the spring. Did you soon after entering into said Hunyady Matyas lease, advertise the Hunyadi Matyas water, and if so, please state in which trade journals your advertisements so appeared, and produce one of said advertisements, if you can.

A. We immediately advertised Hunyadi Matyas in the trade journals. The first one was Deutsch Amerikanische Apotheker Zeitung, using a full page, giving a picture of the labels without colors, a comparative analysis of the Hunyadi Matyas, Hunyadi Janos and the Hunyadi Arpad water, as well as some testimonials. I herewith produce a copy of said advertisement which first appeared in May, 1890, in said journal.

Mr. KNAUTH: Objected to as irrelevant, immaterial, and incompetent.

508 Mr. COE: Counsel for defendant offers in evidence the page produced by witness from said journal, referred to by the witness, and the same is marked "Defendant's Exhibit Hunyadi Matyas Apothecary Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 43. What is the character of the said paper in which the said notice just put in evidence was inserted and its circulation?

Mr. KNAUTH: Objected to as incompetent.

A. This paper at the time had a large circulation among the German apothecaries throughout the United States.

Q. 44. Has the notice so marked in evidence been in your possession ever since May, 1890, when it was first published in the issue of the Apothecaries' Gazette on that date?

A. I won't say that this is on May, 1890, but this advertisement appeared at various times during 1890, and it is one of the numbers that appeared in 1890.

Q. 45. Have you had prepared under your supervision, a list of the issues of said journal, in which notices like Defendant's Exhibit

Hunyadi Matyas Apothecary Advertisement appeared in the years 1890 and 1891, and if so please state the months and years in which said advertisement or a similar advertisement so appeared in said journal?

Mr. KNAUTH: Objected to as incompetent.

A. I had the files of said paper looked up, and this or similar advertisements of Hunyadi Matyas water appeared in the said paper in the May number of 1890, July, August, September, October, November, December, 1890; January, 1891; February, March, April, May, June, July, August and September, 1891.

Q. 46. Did you, in the summer of 1890, also advertise the
509 Hunyadi Matyas water in other trade papers, and if so, can you produce a copy of any such advertisement in any other of said trade papers, and if so please do so?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

A. In the summer of 1890 we advertised in the Duggists' Circular, which is a trade paper widely distributed among the drug trade of the United States, issued monthly in the city of New York, and claiming a circulation from ten thousand to fifteen thousand copies every issue. July, 1890, we paid for an entire page, allowing the paper to use one-quarter of the page on top of our advertisement for reading news, so as to make our advertisement so much more prominent. We paid for this space. I produce a copy of advertisement of July, 1890, page 36*a*, Druggists' Circular.

Mr. KNAUTH: Same objections.

Q. 47. As I understand, this advertisement which you have just described appeared in the issue of said Druggists' Circular for the month of July, 1890; am I correct?

A. Yes, sir.

Mr. COE: Counsel for defendant, offers in evidence the advertisement from said Druggists' Circular referred to and produced by witness, and the same is marked "Def't's Exhibit Druggists' Circular, July, 1890, Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 48. Did the same advertisement appear in the August and September, 1890, issues of said Druggists' Circular?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 49. Can you refer to any advertisement of Hunyadi
510 Matyas which was inserted by you in any journal, either prior to or just at the time of the execution of the Hunyadi Matyas lease of March 14, 1890, and if so please produce the same?

Mr. KNAUTH: Same objections.

A. Before we really had the water here, we had inserted in the

journal called Mineral Waters, which was sent to at least twenty thousand physicians, a one-page advertisement of the Hunyadi Matyas water, giving the analysis of said water and the endorsements it had received. This journal related only to mineral waters and allied knowledges, such as climatology and balneology, and the name of the journal was afterwards changed into the Journal of Balneology.

Q. 50. And I understand you some twenty thousand of these journals of March, 1890, were sent to physicians in or about that month, and prior to the time you had commenced to import and sell Hunyadi Matyas water to any extent. Is that correct?

Mr. KNAUTH: Same objections.

A. It was, I believe, the first start of our advertising it, before we knew how we were going to take up the water at all. This paper was issued in March, 1890, and had to be inserted, I suppose, a month ahead.

Q. 51. So that I understand you that this twenty thousand of these journals were sent out in anticipation of the commencement of the importation and sale of Hunyadi Matyas by you as lessees. Is that substantially correct?

Mr. KNAUTH: Same objections.

A. Yes.

Mr. COE: Counsel for defendant offers in evidence the said journal of March, 1890, containing the advertisement of Hunyadi Matyas referred to by witness, and the same is marked "Defendant's Exhibit Mineral Water Journal Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objections.

511 Q. 52. You have stated that the name of this journal was afterwards changed. Did you also afterwards insert another advertisement of the Hunyadi Matyas water in said journal with its changed name, and if so, can you produce such advertisement, and when was it inserted?

Mr. KNAUTH: Same objections.

A. During the year 1891 we repeatedly inserted in the Journal of Balneology a page advertisement of Hunyadi Matyas water, one of which I have kept in my possession since that time, but I am unable to state on what date or during what month this was inserted; but several of those advertisements appeared. I made a search for copies of this journal, to determine the dates of such insertion, but was unable to find them, as since some years back this paper has been merged into the medical journal called Food.

Mr. COE: Counsel for the defendant offers in evidence the said advertisement referred to by the witness, and the same is marked "Defendant's Exhibit Hunyadi Matyas Journal of Balneology Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objections.

Q. 53. Can you state how largely such advertisement in said Journal of Balneology reached physicians in the United States; if you can, please do so.

Mr. KNAUTH: Same objections.

A. I know that during one of the insertions of this advertisement, I satisfied myself of the fact that this journal was sent as specimen copies to fifty thousand physicians throughout the United States.

Mr. KNAUTH: Objected to as incompetent.

Q. 54. Can you refer to any advertisement you inserted in any trade paper in the year 1890, and if so please produce said
512 advertisement, state what journal it was in, what was the character of such journal and its circulation.

Mr. KNAUTH: Same objections.

A. We inserted a page advertisement of the Hunyadi Matyas water in the American Druggist, in the issue of July, 1890, giving a copy of the label and a comparative analysis, as well as numerous testimonials. I produce said copy. This advertisement appeared several times in this American Druggist, but I cannot recollect now in which issues, and I have made no special search. The American Druggist was a monthly publication circulating largely among the retail and wholesale druggists of the United States, and they also claim to have a circulation of ten thousand or more.

Mr. KNAUTH: Same objections.

Mr. COE: Counsel for defendant offers in evidence the advertisement referred to and produced by witness, and the same is marked "Defendant's Exhibit American Druggists Advertisement, J. A. S., ex'r."

Adjourned to Tuesday, February 15, 1898, at 11 a. m.

SAXLEHNER
v.
EISNER & MENDELSON CO.

NEW YORK, *February* 15, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the direct examination of MORITZ EISNER.

By Mr. COE:

Q. 55. Can you produce any other advertisements in other periodicals or trade journals which you caused to be inserted
513 advertising Hunyadi Matyas water between entering into the Matyas lease contract of 1890, and the present time, and, if so, please do so.

Objected to by complainant's counsel as incompetent, irrelevant, and immaterial.

A. I have caused to be inserted advertisements of Hunyadi Matyas water in the Grocers' Monthly Review, a monthly publication published in the city of New York and circulated mainly among retail grocers of the United States. I cannot exactly state the circulation, but according to the claims of the publishers it is between five and ten thousand monthly. The advertisement appeared on November 1, 1891, December 1, 1891, January 1, 1892, and every month up to November 1, 1892. It was inserted again afterwards in April, 1893, up to May 1, 1894, and appeared every month. It was then inserted again in the April copy of 1896, and appeared every month up to May 1, 1897. The advertisements varied in style and form, but were nearly all alike in essential features advertising the Hunyadi Matyas water. I have brought the copy of April 1, 1896, which I had in my possession, and I had the files of the paper looked over so that my dates are correct.

Same objections.

Counsel for defendants offers in evidence the advertisement of Hunyadi Matyas bitter water shown on page 21 of the issue of the Grocers' Monthly Review of April 1, 1896, and the same is marked "Defendant's Exhibit Hunyadi Matyas Grocers' Advertisement, February 15, 1898, J. A. S., ex'r."

Same objections.

Q. 56. These advertisements, as I understand you, were inserted at the expense and at the request of the Eisner & Mendelson Company; am I correct?

Same objections.

514 A. Yes, sir.

Q. 57. I notice that the Hunyadi Matyas grocer advertisement states "For sale by E. C. Hazard & Co., New York." Please state why the name of that firm appeared on such Hunyadi Matyas advertisement?

Same objections.

A. Because E. C. Hazard & Co. are large wholesale grocers in this city and distributed the water among retail grocers in large quantities.

Q. 58. I further notice in said advertisement the words "World's Columbian Exposition, 1893," on a black seal. These words did not appear in the earlier advertisements prior to the Columbian exposition, did they?

A. They did not; they only appeared after the Columbian exposition.

Q. 59. Can you refer to any other advertisements of Hunyadi Matyas water occurring after March 14, 1890, the date of the Hunyadi Matyas lease, and if so, please refer to same and produce such advertisements?

Same objection.

A. We advertised Hunyadi Matyas water in various price-lists

of jobbing druggists throughout the United States, such as C. N. Crittenten & Co. of this city, the Bolton Drug Company of Brooklyn, the Richardson Drug Company of Omaha, and others which I cannot recollect now, during the years 1891, 1892 and up to the present. I found the issue of the price-list of Charles N. Crittenten & Co. for the year 1895 in my possession with the advertisement appearing on page 426, which I herewith produce.

Same objections.

Counsel for defendant offers in evidence the Hunyadi Matyas advertisement set forth at page 426 of the Crittenten Company's
515 price list referred to, and the same is marked "Hunyadi Matyas Crittenten Advertisement, Feb. 15, 1898, J. A. S., ex'r."

Same objections.

Q. 60. Can you refer to and mention other advertisements inserted by the Eisner & Mendelson Company at their expense in other publications since March 1, 1890, of Hunyadi Matyas water, and if so, please do so in as much detail as possible according to your present recollection?

Same objections.

A. We caused to be inserted large advertisements of Hunyadi Matyas water in a publication called New Era, which is published in Detroit; I believe, at first it was a monthly publication, if I recall right, and afterwards changed to a weekly publication or biweekly, I don't recollect exactly which, but I do know that we advertised in there off and on Hunyadi Matyas water since 1892. I have caused the files of the paper to be looked over, but the files kept in the office of this publication in this city do not contain the advertisements. The original files are kept in Detroit, and this publication goes mainly to wholesale and retail druggists, particularly out West, and has a circulation which they claim reaches from ten to twenty thousand copies each issue. We also caused to be inserted in the publication called the Pharmaceutesche Rundschau, a monthly publication, which circulated among the better class of German apothecaries, advertisements of the Hunyadi Matyas bitter water. I am not able to state the circulation. The advertisements appeared from time to time from July, 1891, on, for about a year. Afterwards this publication was discontinued.

We also caused advertisements of the Hunyadi water to be inserted in the Oil, Paint and Drug Reporter of this city, sometimes using full pages, in the year 1892 and maybe later on, but I have not yet looked over the files of this paper. The Oil,
516 Paint and Drug Reporter is a weekly publication published in this city, which goes mainly to jobbing druggists and other allied trades.

At our instigation we also caused the Druggists' Circular to republish, editorially, the circular we issued to the trade in 1890, to which I have previously referred. The copy of the publication

which was inserted in the Druggists' Circular in the May number of 1890, I herewith produce.

Same objections.

Counsel for defendants offers in evidence the clipping from the editorial page of the said publication produced by witness, and it is marked "Defendant's Exhibit Hunyadi Matyas Druggists' Circular Notice, February 15, 1898, J. A. S., ex'r."

Same objections.

Q. 61. You have referred in your previous examination to certain Hunyadi waters, which you say were in the market at the time you entered into your 1889 Mattoni contract, and among these waters you have mentioned the Hunyadi Arpad water. Prior to 1890, how long had you known of this Hunyadi Arpad being in the American market?

A. It was either in 1886 or in 1887 that it first came to my knowledge.

Q. 62. Can you produce any advertisements of such Hunyadi Arpad water, and, if so, please do so and explain same?

Same objections.

A. The first advertisement that came to my notice of the Hunyadi Arpad water was published in the Druggists' Circular, in December, 1888, which I herewith produce. There may have been others previous to that that I am not familiar with.

Same objections.

517 Counsel for defendants offers in evidence the Hunyadi Arpad advertisement of December, 1888, produced by the witness, and the same is marked "Defendant's Exhibit Hunyadi Arpad Advertisement No. 1, February 15, 1898, J. A. S., ex'r."

Same objections.

The WITNESS (continuing): My attention was also called to an advertisement which appeared in the March number of the Druggists' Circular of 1889, which showed the label of the Hunyadi Arpad water in colors. This advertisement occupied two pages, one of which contained a description of the article, and also showed a comparative analysis of the Hunyadi Arpad, the Hunyadi Janos and other waters, and the reverse page showed the colored label. This advertisement has been in my possession ever since its appearance in the Druggists' Circular in the March copy of 1889.

Same objections.

Counsel for defendants offer in evidence the advertisement produced and explained by the witness, and the same is marked "Defendant's Exhibit Hunyadi Arpad Advertisement No. 2, February 15, 1898, J. A. S., ex'r."

Same objections.

The WITNESS (continuing): Another advertisement of Hunyadi Arpad appeared in July, 1890, in the Druggists' Circular, of New York city, which gives the shape of the barrel and style of label without colors, which I now produce.

Same objections.

Counsel for defendants offer in evidence the advertisement referred to and produced by the witness, and the same is
518 marked "Defendant's Exhibit Hunyadi Arpad Advertisement No. 3, February 15, 1898, J. A. S., ex'r."

Same objections.

Q. 63. Have you had search made under your supervision as to whether or not these advertisements or similar ones were published in other issues of the Druggists' Circular than those you have produced, and which have been marked in evidence, and, if so, please state the dates when such other similar advertisements of Hunyadi Arpad water were inserted in the Druggists' Circular?

Same objections.

A. I knew that other advertisements appeared during the years 1889 and 1890, and later on of the Hunyadi Arpad in the Druggists' Circular, and as I had no copies, which I had saved at the time, besides the one produced, I caused search to be made at the office of the Druggists' Circular, and advertisements of the Hunyadi Arpad water, similar to the three produced, were inserted in the Druggists' Circular in the issues of December, 1888, and January and February, 1889. In March, 1889, the colored advertisement appeared; in April, May, June, July, August, September, October, November, and December, 1889; in January, February, March, April, May, June, July, August, September, October, November, and December, 1890; in January, February, March, April, May, June, July, August, September, October, November, and December, 1891; and in January, February, March, April, May, and June, 1892. In the copies of March, 1889, March, 1890, and various other times, there was also a small advertisement on the front page of the paper referring to the large advertisement in the inside of the publication.

The answer is objected to by complainant's counsel as incompetent.

519 Q. 64. Can you refer to and produce any other advertisements of Hunyadi Arpad water in any other publication inserted in the years 1889 and 1890, and if so, please produce such advertisements?

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

A. In 1889 I saw the Hunyadi Arpad advertisements in the Medical Record, a publication published in the city of New York which mainly circulates amongst the best class of physicians throughout the United States and I saved the copy of June 8, 1889, which has been in my possession ever since, and I herewith produce it.

Counsel for defendants offer in evidence the Hunyadi Arpad advertisement in the Medical Record of June 8, 1889, produced by the witness and the same is marked "Defendant's Exhibit Hunyadi Arpad Medical Record Advertisement, Feb. 15, 1898, J. A. S., ex'r."

Same objections.

Q. 65. Can you refer to any other issues of the said Medical Record of the years 1889 and 1890 when similar advertisements to the one produced in evidence were inserted in such journal, and if so, please state?

Same objections.

A. As I have not saved any other issue of this paper showing the advertisement, I caused search to be made knowing that the advertisements of Hunyadi Arpad appeared at the time, and I found that those, or similar advertisements, appeared in the Medical Record in the issues of June 29th, July 6th, July 13th, July 20th, August 3rd, August 17th, August 31st, September 14th, September 28th, October 12th, November 2nd, November 16th, November 23rd, November 30th, December 7th, December 14th, December 21st and December 28th, 1889; January 4th, January 11th, January 18th, Jan-
520 uary 25th, February 1st, February 22nd and March 1st, 1890.

Objected to by complainant's counsel as incompetent.

Q. 66. Did the Eisner & Mendelson Company in the year 1892 acquire the right to sell the Hunyadi Arpad, the Hunyadi Belas and other waters of Hungarian springs belonging to Joseph Unger & Son, and if so, please state about what time the said Eisner & Mendelson Company acquired such right and under what circumstances?

A. We acquired the exclusive right to sell the Hunyadi Arpad, the Hunyadi Belas, the Victoria and the Rackoczi Gyorgy waters, springs which were owned by the firm of Joseph Unger & Son at Buda Pesth. When we started to sell the Hunyadi Matyas water in this country and advertised it boldly among the trade and newspapers and distributed pamphlets and samples to physicians and constantly sent out mailing slips with our mail matter from our office to the public, we made great inroads upon the sale of the Hunyadi Arpad water in the United States. We also had men calling on physicians at that time, and the owner of the Arpad spring feared that we would gradually get the largest sale in this country of Hunyadi waters. He therefore proposed a combination by which we would acquire the agency for his springs, if we would agree not to sell any more Hunyadi Matyas water than the waters of his springs—in other words, to keep the sales alike. We agreed upon this point and made a contract by which we acquired the sole and exclusive agency for Unger's waters in the United States.

Objected to by complainant's counsel as argumentative hearsay evidence and incompetent.

Q. 67. At what time did you enter into this contract?

A. During the summer of 1892; maybe in August or July or somewhere thereabouts.

521 Q. 68. Was this contract in writing?

A. Yes, sir.

Q. 69. Can you produce the original or a copy thereof?

A. I cannot.

Q. 70. Why not?

A. Because Joseph Unger & Sons sold their springs to Andreas Saxlehner, July 6, 1893, and as the probable sale of his springs to other parties was provided for in said contract we were bound to deliver up our original contract to him upon the receipt of a certain specified consideration, and I personally delivered the contract to the firm of Joseph Unger & Son in July, 1893, at Buda Pesth.

Q. 71. Did you keep any copies of it, and have you made search for such copies?

A. I have made a search for said copies, but I cannot find them up to the present. If I do, I will produce them.

Q. 72. What were the essential points of such contract to the best of your recollection; please state briefly?

Objected to by complainant's counsel as incompetent.

A. We bound ourselves to buy a certain given quantity of the water and to sell the same in the United States alongside the other Hunyadi waters we were handling, with the agreement as stated before to keep the sales equal, and it was distinctly specified that in case Joseph Unger & Son sold their springs within one year we should be bound to give up the agency upon receipt of ten thousand dollars, equal to twenty-five thousand florins in Austrian money. If a sale should take place after one year, and there was a specification of the number of years, the remuneration for giving up the agency should be somewhat larger each year. The exact items of what this amount should be in after years I cannot now recollect, as they do not now come into play.

Q. 73. After making this contract in or about the summer
522 of 1892, did you commence to sell Hunyadi Arpad and Hunyadi Bela, and the other Unger waters specified in said contract in the United States?

A. We did commence at once; we took over the stock that Joseph Unger & Son had in the United States in the hands of their previous agents and warehouses, and paid them for it and commenced to import and sell.

Q. 74. Soon after the time when you entered into this Unger contract in the summer of 1892, did you advertise said waters in any publications, and if so, can you produce any of such advertisements, and if you can please do so?

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

A. We immediately advertised a special price-list of the various Hunyadi and other waters which we handled, in the September issue of the Oil, Paint & Drug Reporter of the city of New York. I herewith produce a copy of the publication of September 26, 1892, which has been in my possession ever since.

Counsel for defendants offers in evidence the advertisement referred to by the witness and the same is marked "Defendant's Exhibit

Hunyadi Drug Reporter Advertisement, Feb. 15, 1898, J. A. S., ex'r."

Same objections.

Q. 75. Did you insert similar advertisements in other issues of the Drug Reporter and, if so, please state?

A. My impression is that we advertised also in the Druggists' Circular and in other papers and that we sent out circulars to the trade particularly about our acquirement of these various agencies. I cannot find any copy at present, but I will have search made and produce them later on, if I can find other advertisements.

Q. 76. For how long a period did you sell Hunyadi Arpad,
523 Hunyadi Belas and the other Ungar waters you have spoken of under the said Ungar contract?

A. We sold Hunyadi Arpad and other waters coming from the springs of Joseph Ungar & Son for some time after we ceased to be the agents because we had considerable stock on hand. It may have been until the end of 1893 or the beginning of 1894, but we ceased to be the agents in the beginning of July, 1893. Whenever I have said Joseph Ungar & Son it should be properly Ignatz Ungar & Son.

Q. 76½. Please state when the Ungar contract with you was terminated and under what circumstances and for what reason and how you are personally cognizant of the circumstances with reference to the same?

A. I learned of the negotiations pending between the firm of Andreas Saxlehner, of Buda Pesth, and Ignatz Ungar & Son about the sales of the Ungar springs to Saxlehner through our representative abroad who was at the time in Buda Pesth and I at once sailed abroad. That was some time in or about May, I think, 1893. I went to Buda Pesth and for a time the negotiations between the two firms were pending while I was in daily communication with the members of the firm of Ignatz Ungar & Son. There seemed to be a hitch in reference to the twenty-five thousand florins which we were to get as the firm of Andreas Saxlehner was determined to purchase the springs only if there were no contracts of any kind out against the springs. The firm of Ignatz Ungar & Son was willing to take the 200,000 florins which were offered them, but on our account they had to raise the limit to 225,000, and these negotiations were carried on for a length of time until they finally agreed to pay them 225,000 florins for the springs. I thereupon gave up our contract and a general release and received the value of 25,000 florins in merchandise from Ignatz Ungar & Son and the sale of the springs to firm of Andreas Saxlehner was carried out on July 6th, 1893.

Same objections.

524 Q. 77. Are you able to produce any statement from any paper in Buda Pesth which has been in your possession since July, 1893, with reference to this sale of the Unger springs to Andreas Saxlehner, and if so, please produce the same.

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

A. In the evening paper of the Pester Lloyd, issued at Buda Pesth on the 6th of July, 1893, the following notice appeared under the head "Change of ownership," which I have had in my possession ever since (producing paper).

Counsel for defendants offers in evidence the paper produced by the witness and the same is marked "Defendant's Exhibit Pester Lloyd Item, Feb. 15, 1898, J. A. S., ex'r."

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

Q. 78. Will you please translate the said item which appears in the Pester Lloyd paper into the English language and give said translation on the record?

A. I do so, and the following is a translation of the item: "All the bitter-water springs owned by the firm of Ignatz Unger & Son have been transferred with all trade-marks belonging thereto, with the exception of the outstanding accounts and the inventory to the firm of Andreas Saxlehner, the new owner, for the amount of 225,000 florins. We learn that the firm of Unger will in future give their entire energy to the Kschauer factory owned by them."

Q. 79. State whether or not after the sale of said Unger springs to the firm of Andreas Saxlehner you made any written or printed announcement with reference to said purchase, and if so please produce said announcement and explain the circumstances under which it was sent out and to whom?

525

Same objections.

A. In August, 1893, we sent circular letters to the entire jobbing trade and to all the druggists in the largest cities of the United States announcing the fact that the Hunyadi Arpad, Hunyadi Belas, Victoria, and other springs formerly owned by the firm of Ignatz Ungar & Son, of Buda Pesth, had been sold to Andreas Saxlehner, the proprietor of the Hunyadi Janos spring, and that we were informed by the firm of Ignatz Ungar & Son that these springs were to be closed up and withdrawn from the market by their new owner, and we offered in said announcement to sell what regular stock we had of the springs of Ignatz Ungar & Son at the regular price. I herewith produce such announcement.

Counsel for defendant offers in evidence the announcement or circular produced by the witness, and the same is marked "Defendant's Exhibit Eisner & Mendelson 1893 Notice, February 15, 1898, J. A. S., ex'r."

Same objections.

Adjourned to Thursday, February 17, 1898, at 2 p. m.

SAXLEHNER
vs.
EISNER & MENDELSON CO.

NEW YORK, *February* 17, 1898.

Met pursuant to adjournment.
Appearances as before.

MORITZ EISNER—direct examination resumed.

By Mr. COE:

Q. 80. Have you found any other advertisement of Hun-
526 yadi Arpad water, and if so, please produce the same, and state in what periodical it appeared, and when, and who inserted it, and what firm, if you know, inserted the same?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

A. I have found the advertisement of the Hunyadi Arpad water in a publication called "Notes on New Remedies." This publication was published at the time by Lehn & Fink, wholesale druggists of this city, and was sent to a large number of retail druggists throughout the United States. This advertisement must have appeared either in the year 1889, 1890 or 1891; it was positively before we obtained the Ungar contract, and may have been inserted either by Joseph Ungar representing the firm of Ignatz Ungar & Son, who was here during the years 1889, 1890 and 1891, or by his agents, Perrine & Company. I herewith produce the said advertisement, which I have had in my possession ever since its appearance.

Mr. KNAUTH: Same objection.

Mr. COE: Counsel for defendants offers in evidence said advertisement produced by witness, and it is marked "Defendant's Exhibit Hunyadi Arpad Advertisement No. 4, J. A. S., ex'r."

Q. 81. You have hitherto stated in your examination that the Eisner & Mendelson Company caused to be published various advertisements of Hunyadi Matyas in the year 1890, 1891, 1892, 1893, and so on. Can you anywhere produce various advertisements from different periodicals and newspapers both in the Eastern and Western States—can you produce any advertisements which was inserted in a far western paper, and if so, please produce the same.

Mr. KNAUTH: Same objection.

A. I herewith produce an advertisement which was in-
527 serted in the San Francisco Daily Report November 22, 1893, advertising the Hunyadi Matyas water. This has been in my possession ever since November, 1893.

Mr. COE: Counsel for defendant offers in evidence advertisement produced by witness, and the same is marked "Hunyadi Matyas San Francisco Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objections.

Q. 82. You have stated, as I understand you, at the last session, that the contract you had with Ignatz Ungar and Son with reference to the sale of Hunyadi Arpad, Hunyadi Bela and other waters was in writing, and that you did not have any original of the same and could not produce at that session a copy of said contract, but that you would make search for such copy and if you could find the same would produce it at this session. Have you made such search and can you produce a copy of the same, and please state what that copy is and how you came to have it in your possession?

Mr. KNAUTH: Same objections.

A. At the last session I forgot that our chief clerk made copies of all our contracts in a private book; only, after I returned to the office I asked him about the copy of the Hunyadi Arpad contract and he brought a book wherein the copy appeared which he had written in himself from the original, and I read it over, and from my recollection this is an exact copy of the original. I caused a copy to be made, which I herewith produce.

Mr. COE: Counsel for defendant offers in evidence the copy referred to by witness as being a copy of the copy contract in said book, the same being in the German language, and the same is marked "Defendant's Exhibit Ungar Contract, J. A. S., ex'r."

528 Mr. KNAUTH: Complainant's counsel consents that the copy for use offered in evidence be substituted in place of the copy contained in the book in the hands of the witness, subject to correction by future comparison of the two copies; but objects to the offering of any copy of this contract, as incompetent, immaterial and irrelevant.

Q. 83. You have stated, as I understand, in your previous examination, in giving the history of this contract, that the original of such contract was delivered by you to the firm of Ignatz Ungar & Son at or about the time of its cancellation and termination and the sale of the Ungar springs referred to in said contract to the firm of Andreas Saxlehner in July, 1893. Do you know what became of such original contract which you say was delivered to Ignatz Ungar & Son in or about July, 1893?

A. The senior partner of that firm demanded the original contract and some writing which was subsequent to that contract and which referred to the sale of the springs to be delivered to him, because he had to deliver it to the firm of Andreas Saxlehner as cancelled before he could close with them as to the sale of the springs. I so delivered them to his hands.

Mr. KNAUTH: Objected to as incompetent.

Q. 84. What, to the best of your knowledge and belief, became of such original contract and the other paper you have referred to; you said it was demanded?

A. As far as I am informed and believe, the contract and the subsequent agreement pertaining thereto were delivered over to the firm of Andreas Saxlehner.

Same objection.

Mr. COE: Counsel for defendant also offers in evidence an English translation of the said Defendant's Exhibit Ungar Contract,
529 and the same is marked "Defendant's Exhibit Ungar Contract, English Translation, J. A. S., ex'r."

Mr. KNAUTH: Complainant's counsel consents that the translation be received subject to correction after comparison with the German copy, but objects to the offer and exhibit as immaterial, irrelevant and incompetent.

Q. 85. You have stated at the last session that to your recollection there was in this Ungar contract on May 2, 1892, of which you have just produced the copies marked in evidence, a clause to the effect that if a sale of the spring was effected within a year, you were to receive a certain sum of money and other matter connected with the sale of the spring thereafter, if such sale should be effected. After referring to this contract, does such an item appear in the same?

A. No.

Q. 86. Was there any subsequent arrangement or agreement between you and Ungar, embodying a clause or an arrangement to that effect?

A. There was shortly after the conclusion of the contract a letter which they wrote us in reference to the sale of the springs.

Mr. KNAUTH: Objected to as hearsay.

The WITNESS: But I cannot find a copy of that letter. It was the paper I referred to in my previous answer when I said I delivered the contract and some subsequent arrangement into the hands of the firm of Ignatz Ungar & Son. That arrangement was simply pertaining to the eventual sale of the springs, and I herewith produce a letter dated May 4th, 1893, when the sale was nearly accomplished, or at least pending, wherein that arrangement is referred to as an appendix to the contract——

Mr. KNAUTH: Objected to as incompetent.

The WITNESS (continuing): And the amount stipulated—the amount which we were to receive under said arrangement stipulated.

530 Q. 87. Who was this letter from and what does it state?

Same objection.

A. This letter is from the firm of Ignatz Ungar & Son, written Buda Pest, on the 4th of May, 1893, and contains an arrangement arrived at between our representative, Mr. Ludwig Oliven, who first went to Budapest when this sale was pending, as I stated in my previous examination, before I arrived there.

Mr. KNAUTH: Objected to as incompetent.

The WITNESS (continuing): I herewith produce said letter which has been in my possession ever since.

Mr. COE: Counsel for defendant offers in evidence said letter of

May 4th, 1893, and the same is marked "Defendant's Exhibit Ungar Letter, J. A. S., ex'r."

Mr. KNAUTH: Objected to as incompetent, irrelevant and immaterial.

Mr. COE: Counsel for defendant also offers in evidence an English translation of the said letter and the same is marked in evidence "Defendant's Exhibit Ungar Letter, English Translation, J. A. S., ex'r."

Mr. KNAUTH: Same objections; but the translation is received subject to correction by the original.

Q. 88. In the previous session you have referred to and produced in evidence an announcement which you made to the trade with reference to the sale of the Ungar springs to the firm of Andreas Saxlehner, in July, 1893, such announcement being offered in evidence as Defendant's Exhibit Eisner & Mendelson 1893 Notice. Did you base this announcement in addition to the knowledge of the facts of the sale and so forth to which you have testified
531 at the last session, on any special written or printed notice or announcement from the firm of Ignatz Ungar & Son? And, if so, please produce the same and explain what it is.

Mr. KNAUTH: Same objections.

A. The firm of Ignatz Ungar & Son mailed, under date of July 6, 1893, printed notices of said sale or of the sale of the springs formerly owned by said firm, to the firm of Andreas Saxlehner, to all of their trade; that is to——

Mr. KNAUTH: Objected to as hearsay and incompetent.

A. (continued). To all dealers throughout the world, whoever had bought Hunyadi waters or other bitter waters from them.

Mr. KNAUTH: Same objection.

A. (continued). We also received by mail direct from them, at our office, this circular letter, being one of the circular letters I have just referred to, and I have had it in my possession ever since.

Mr. KNAUTH: Same objections.

Mr. COE: Letter produced by witness, the same being in the German language, offered in evidence by defendant's counsel, and marked "Defendant's Exhibit Ungar Letter, July 6, 1893, J. A. S., ex'r."

Mr. KNAUTH: Same objections.

Mr. COE: Counsel for defendants also offers in evidence an English translation of the same, and it is marked "Defendant's Exhibit Ungar Letter, July 6, 1893, English Translation, J. A. S., ex'r."

Mr. KNAUTH: Same objections. The correctness of the translation is admitted.

532 Q. 89. At or about the time when you entered into the said Ungar contract of May 2, 1892, who were the agents for Ignatz Ungar & Son in this country, if you know?

A. The firm of M. & J. S. Perrine, of Philadelphia, were at that

time the agents for Ignatz Ungar & Son for the United States, for the Hunyadi Arpad water, with the exception of the New England States; in the New England States the firm of Cutler Brothers, of Boston, were the agents for the Hunyadi Arpad water.

Q. 90. Did you, at the time of entering into the said Ungar contract of May 2, 1892, make any arrangement with Perrine & Company to terminate their agency, and if so, was such arrangement in writing and can you produce the same?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. We had to purchase the rights of Perrine & Company to said agency from them first, before we could enter into the agreement with Ungar, and we so purchased, for a consideration of $2,500 and other considerations, the rights to said agency of the firm of M. & J. S. Perrine. This arrangement was in writing and was entered into on April 29, 1892, and I herewith produce the original.

Mr. KNAUTH: Same objections.

Mr. COE: Counsel for defendant offers the said agreement in writing in evidence, and the same is marked "Defendant's Exhibit Perrine Agreement, J. A. S., ex'r."

Mr. KNAUTH: Same objection to the exhibit.

Q. 91. You have stated that said Perrine & Company were the agents for Ungar's Hunyadi Arpad, prior to your contract with Ungar of May 2d, 1892, with the exception of the New England States, and as to those States that Cutler Brothers & Company were such agents. Did you also, at or prior to the time you entered into the Ungar contract of May 2, 1892, enter into an arrangement
533 with said Cutler Brothers & Company with reference to the termination of their agency?

Mr. KNAUTH: Same objection.

A. My best recollection is that shortly after entering into the contract with Ungar & Son, we bought Cutler Brothers' agreement out, also for a cash consideration, but I cannot tell exactly what consideration they received, as I had entirely discarded this matter from my mind for many years.

Q. 92. Was the agreement of termination in writing, if you recollect?

A. It must have been in writing; it must have been in writing, and if possible I will try to find it.

Q. 93. In the Ungar contract of May 2d, 1892, produced by you in evidence, and also in an advertisement to the trade, produced by you in evidence, in the previous session, dated September, 1892, you also speak, in addition to the Hunyadi Arpad and Hunyadi Bela waters, of the Hunyadi Laszlo water as being on sale by the Eisner & Mendelson Company. What was this Hunyadi Laszlo water?

A. The Hunyadi Laszlo water was a Hungarian bitter water imported from Buda Pesth, which we imported from the year 1892 up to 1895, I think, and was sold here on the market.

Q. 94. Who were the owners of the Hunyadi Laszlo springs you have referred to?

A. The Compagnie Generale d'eaux minerales et de bains de mer.

Q. 95. Did you enter into any agreement with said company with reference to the sale of the Hunyadi Laszlo water, and if so, can you produce such agreement or a copy thereof?

A. We did enter into an agreement with said company for the sale of their water. The original contract I have in my possession at my office and I will produce the same at the next session.

Q. 96. When was such original contract dated?

A. March 30th, 1892.

Q. 97. Before you commenced to sell the Hunyadi Laszlo
534 water under this contract on March 30th, 1892, was the same on sale in the United States, and if so, who were the agents, if you recollect?

A. This water was for sale in the United States and imported by Bouge Fils & Co.

Q. 98. For how long prior to July 30th, 1892?

A. Some years; I cannot exactly tell the time; it may have been since 1889 or 1890.

Q. 99. And as I understand you, after entering into this Laszlo contract of March 30th, 1892, you sold the Hunyadi Laszlo water during the years 1892, 1893 and 1894, and ceased to import and sell the same some time in the year 1895; am I correct?

A. That is my best recollection; my best recollection is that in 1895 we ceased to import and sell.

Q. 100. In a previous session you have offered in evidence an advertisement of the Apollinaris Company, Limited, which appeared in the Medical Record of April 6th, 1889, marked "Defendant's Exhibit Apollinaris Advertisement," in which said company states that it begs "to announce that as numerous waters are offered to the public under names of which the word 'Hunyadi' forms part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond," etc. In or about the year 1893, did the Apollinaris Company, Limited, or their agents for the United States, make any announcement to your knowledge, with reference to the word "Hunyadi" being a generic name, and if so, can you produce any such announcement or advertisement, and if so, please produce the same?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent and especially as inadmissible, because not connected with the complainant.

A. In the early part of 1893, as early as January, and all through the year 1893 and 1894, the Apollinaris Company, Limited, and
their agents for the United States, Charles Graef & Company,
535 advertised in all the leading newspapers of the United States.

Mr. KNAUTH: Objected to as incompetent.

A. (continued). I have seen the advertisement in the New York

Herald, in the New York Times, in the New York Tribune, in the New York World, in various Philadelphia papers, Chicago papers and Boston papers——

Mr. KNAUTH: Same objection.

A. (continued). —repeatedly. I kept one which I had in my possession ever since, which appeared in the New York Herald in the early part of 1893. The same advertisement also appeared in the various drug journals, like the Druggists' Circular or Paint and Drug Reporter, in the Medical Record and other medical papers. These items referred to were in similar and almost exactly the same language as the one I herewith produce, which is from the New York Herald in the early part of 1893.

Mr. KNAUTH: Same objection.

Mr. COE: The advertisement in the New York Herald of 1893, referred to by the witness, is offered in evidence by defendant's counsel, and the same is marked "Defendant's Exhibit New York Herald Apollinaris 1893 Advertisement, J. A. S., ex'r."

Same objection.

Q. 101. State whether or not the Apollinaris Company, Limited, or their agents for the United States, Charles Graef & Company, made any other announcement to the trade with reference to the word "Hunyadi" being a generic name for Hungarian bitter waters in the year 1893, and if so, if you have any of such announcements; please produce the same?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

536 A. I herewith produce what appears to be an exact copy of the advertisement heretofore referred to, of the New York Herald of 1893, which I have just produced, and this advertisement was sent by mail to the entire mineral-water trade throughout the United States.

Mr. KNAUTH: Objected to as incompetent, the witness not having shown any knowledge on the subject.

A. (continued). This advertisement which I herewith produce I received from Aschenbach & Muller in Philadelphia, who mailed it to us, stating that they had received it by mail, and I have kept it ever since. This was some time in 1893.

Mr. KNAUTH: Objected to as incompetent.

Mr. COE: Counsel for defendant offers in evidence the paper referred to and it is marked "Defendant's Exhibit Apo-linaris 1893 Trade Notice, J. A. S., ex'r."

Mr. KNAUTH: Same objections.

Q. 102. Who was the firm of Aschenbach & Muller referred to in your last answer?

A. Wholesale druggists and mineral-water dealers in the city of Philadelphia, Penn.

Q. 103. You have stated in your previous answer that notices similar to "Defendant's Exhibit Apollinaris 1893 Trade Notice" was sent to the mineral-water trade throughout the United States. On what do you base this statement?

A. All our salesmen reported from various parts of the country that the trade had received this circular—similar circulars; we received from numerous customers of our Hunyadi Matyas water and other goods copies of the circulars—copies of the said circular which they had received from Charles Graef & Company, and from what I learned in the trade generally I have good reason to
537 believe it was sent to the entire drug trade throughout the United States.

Mr. KNAUTH: Objected to as incompetent.

Q. 104. Did the Apollinaris Company in the year 1893, also make other announ-cements with reference to the word "Hunyadi" having become a generic name, and if so, in what way?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

A. In 1893, the Apollinaris Company sent to all the physicians throughout the United States postal cards the same as I produce here.

Mr. KNAUTH: Objected to as incompetent, the witness not being shown to have any knowledge of the subject.

A. (continued). One of these postals which appears to be wrongly addressed to Dr. E. I. Wooden, Indiana, no city, was by the post-office of New York city returned to our office and I had it in my possession ever since.

Mr. KNAUTH: Objected to as incompetent.

Counsel for defendants offers in evidence the postal card referred to and it is marked "Defendant's Exhibit Apollinaris Hunyadi Postal Card No. 1, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

A. (continued). This postal card I now produce, addressed to Dr. G. Artwell Brickett, Augusta, Maine——

Mr. KNAUTH: Same objection, the witness has not shown any knowledge on the subject.

A. (continued).—was sent to us by mail by our travelling salesman, who was at that time visiting physicians, with the report that
538 these postals had been received by every physician in the section in which he travelled.

Mr. KNAUTH: Objected to as hearsay and incompetent.

Mr. COE: Counsel for defendants offers in evidence the postal card produced by witness, and it is marked "Defendant's Exhibit Apollinaris Hunyadi Postal Card No. 2, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

A. (continued). I also produce another similar postal card, directed to Dr. E. C. Hallenbeck, Bethlehem, N. Y., which also was returned to us by the post-office authorities.

Mr. KNAUTH: Same objection.

Mr. COE: Counsel for defendants offers in evidence said postal card, and it is marked "Defendant's Exhibit Hunyadi Postal Card No. 3, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

A. (continued). I also produce another postal card which has been in my possession ever since it was returned to us by the post-office of this city——

Mr. KNAUTH: Same objection.

A. (continued). —addressed to Dr. L. L. Dodd, Indianapolis, Indiana.

Mr. COE: Counsel for defendants also offers in evidence said postal card, and it is marked "Defendant's Exhibit Apollinaris Hunyadi Postal Card No. 4, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

A. (continued). I also produce another postal card directed to Dr. E. F. Nickernee, Hartford, Mass., which also was returned
539 to us by the post-office authorities and which I had in my possession ever since.

Mr. COE: Counsel for defendants offers in evidence said postal card and it is marked "Defendant's Exhibit Hunyadi Postal Card No. 5, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 105. I understand you to say that all of these exhibits which just have been marked, relating to the advertisement by the Apollinaris Company, Limited, or by their agents for the United States, Charles Graef & Co. with reference to the word "Hunyadi" being generic, have been in your possession ever since the times in the year 1893, when you received them; am I correct?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 106. I notice that two or three of the postal cards you have referred to bear date May 6, 1893. Do you know how widely similar postal cards were sent throughout the United States and to what classes of people at or about this date, May 6, 1893, by the Apollinaris Company or their agents, Charles Graef & Company, and if so, please state the source of your knowledge.

Mr. KNAUTH: Objected to as incompetent.

A. From our agents and traveling men, that they were circulated all over the United States.

Q. 107. Among what classes?

A. Physicians.

Mr. KNAUTH: Objected to as hearsay.

Q. 108. You have stated in your previous answers that similar advertisements to those you have produced, with reference to the word "Hunyadi" being generic, were inserted by the Apollinaris Company or its agents, Charles Graef & Company, in various
540 trade and medical journals. Can you produce any such advertisement from a medical journal in the year 1893, and if so, please do so?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

A. I herewith produce the advertisement which appeared in the Medical Record of April 8, 1893, and which has been in my possession ever since.

Mr. COE: Defendant's counsel offers in evidence said advertisement and it is marked "Defendant's Exhibit Apollinaris Hunyadi Medical Record Advertisement, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 109. This advertisement, as I understand, appeared in the issue of the Medical Record of April 8, 1893. Did similar advertisements appear in other issues of the said Medical Record of the year 1893, and if so, please state what issues?

Mr. KNAUTH: Same objections.

A. I have caused a search to be made by one of my employés, and learn that the same advertisement appeared on February 4, 11, 18, 25, March 4, 11, 18, 25, April 1, 8, 15, 22, 29, May 6, 13 and 20 of 1893.

Same objections.

Adjourned to Saturday, February 19, 1898, at 11 o'clock a. m.

541 SAXLEHNER
v.
EISNER & MENDELSON CO.

NEW YORK, *February* 19, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the direct examination of MORITZ EISNER.

By Mr. COE:

Q. 110. State whether or not Heinrich Mattoni had knowledge of the Ungar and Laszlo contracts, and if so, whether you entered into those contracts with his consent and under what circumstances?

A. The Arpad contract was talked over with one of the sons of Ungar here in New York city in the beginning of 1892, and I thereupon went abroad and met one of the firm of Ignatz Ungar & Son by appointment, in Vienna. I went with him to the office of Heinrich Mattoni and explained matters there and brought the two

gentlemen together and we thereupon entered with the full knowledge and consent of Heinrich Mattoni into the Arpad contract as well as into the Laszlo contract.

Q. 111. At the last session you said you would produce a copy of the Laszlo contract; if so, will you please produce the same.

A. The Laszlo contract is not a legal document. It is simply contained in two letters, one dated March 10th and one April 1st.

Q. 112. And, as I understand you, these two letters form the Laszlo contract or arrangement?

A. Form the understanding with the owners of the Laszlo spring.

The two letters produced by the witness are offered in evidence by defendant's counsel, and the same are marked "Defendant's Exhibits Laszlo Contract Nos. 1 and 2, February 19, 1898, J. A. S., ex'r."

Objected to as immaterial and irrelevant.

542 Q. 113. You have stated in your previous testimony that the Hunyadi Laszlo spring was a spring of Hungarian bitter water, but, as I recollect, you have not stated expressly where such spring is situated. Please state where such spring is situated in Hungary.

A. This spring is located at Buda Pesth, not far distant from the Hunyadi Janos springs.

Q. 114. Did the Eisner & Mendelson Company obtain a United States trade-mark for Hunyadi Matyas water in the United States? And, if so, please produce the said trade-mark, and state when it was so obtained.

Same objection.

A. The Eisner & Mendelson Company obtained a United States trade-mark for the Hunyadi Matyas water on the 22nd day of August, 1893, which I herewith produce.

Counsel for defendants offers in evidence said original trade-mark, and it is marked "Defendant's Exhibit Hunyadi Matyas United States Trade-mark, February 19, 1893, J. A. S., ex'r."

Same objection.

Q. 115. As I understand, from your previous testimony, the Eisner & Mendelson Company commenced to sell the Hunyadi Matyas water, under its Hunyadi Matyas lease of March, 1890, right away, after entering into such lease, and in the month of March, 1890. Please look at the labeled bottle of Hunyadi Matyas water, offered in evidence by complainant's counsel, and marked "Complainant's Exhibit B," and state whether the label on such bottle, such bottle itself and capsules thereon, represent substantially the labels, bottles, and capsules containing such Hunyadi Matyas water, and on the bottles of the same, as the Eisner & Mendelson Company commenced to sell such water under the Hunyadi Matyas lease in March, 1890.

543 A. The bottles, labels, and caps are substantially the same. There may have been some changes made in some minor

parts of the label, and probably in the cap, but the general appearance was the same. The side label, with the words "Seal brand" on, was not on the bottles until some time in the year 1893.

Q. 116. And with the exception of the side label which you have referred to, and which I shall ask you to explain further, and which you say was first put on in the year 1893, you have sold Hunyadi Matyas water continuously under the same main colored label and with the same colors and in substantially the same bottles and substantially the same capsules continuously, ever since March, 1890; am I correct?

A. Yes, sir.

Q. 117. You have referred to and produced, and I have offered in evidence, certain advertisements and postal cards sent out by the Apollinaris Company Limited or their agents in the United States, Charles Graef & Company, announcing with reference to the word "Hunyadi" being a generic term for Hungarian bitter waters, and you have identified the dates of those advertisements as in the year 1893. At the time those advertisements were published and circulated, what Hunyadis were in the market to your knowledge?

A. Those advertisements were circulated during the years 1893, 1894 and 1895, and probably as late as the year 1896, but I am not sure of that. In 1893, when they first appeared, we were agents for the Hunyadi Matyas water, the Hunyadi Arpad water, the Hunyadi Bela water, the Hunyadi Laszlo water, and were selling the same in large quantities in competition with the Hunyadi Janos water, the Hunyadi Lajos water, the Hunyadi Miklos water, the Hunyadi Josef water—there may have been others, but I don't recall them just now.

Q. 118. Can you produce a bottle of Hunyadi Arpad water, showing the label, bottle and capsule of such Hunyadi Arpad water as sold by you in 1893 at the time the said Appollinaris advertise-
544 ments and postal cards were published and circulated? And if so, please do so.

A. I herewith produce a bottle of Hunyadi Arpad water as sold by us under our Ungar contract at that time. This bottle, with this label and capsule has been in my possession ever since either the year 1892 or 1893.

Mr. Coe: Counsel for defendant offers in evidence the said labeled bottle produced by witness, and the same is marked "Defendant's Exhibit Hunyadi Arpad Bottle, J. A. S., ex'r."

Q. 119. Look at the labeled bottle now shown you, introduced in evidence by complainant's counsel in this suit, and marked "Complainant's Exhibit Hunyadi Laszlo Bottle," and state whether or not such bottle shows the style of bottle, label and capsule — which you imported and sold Hunyadi Laszlo water in the year 1893 and at the time said Apolinaris advertisements and circulars were published and circulated?

A. This bottle marked "Complainant's Exhibit Hunyadi Laszlo Bottle" shows the style of bottle, label and capsule under which we

imported the Hunyadi Laszlo water under our Laszlo arrangement at the time you asked me.

Q. 120. Can you produce a bottle of Hunyadi Bela water sold by you under the Ungar contract at the time in 1893 when the Apollinaris Company issued and circulated the Apollinaris advertisements and circulars and postals offered in evidence, or if not a bottle, can you produce a label of Hunyadi Bela water, showing the style of label which you used on the Hunyadi Bela bottles?

A. I cannot produce a bottle, but I have had ever since a label in my possession of the Hunyadi Bela, which I herewith produce.

Mr. Coe: Counsel for defendant offers in evidence said Hunyadi Bela label produced by witness, and the same is marked "Defendant's Exhibit Hunyadi Bela Label, J. A. S., ex'r."

545 Q. 121. On what style of bottle did such Hunyadi Bela labels appear at the time inquired about in my last question in 1893?

A. The style and shape bottle is exactly the same as the Arpad bottle which I have produced.

Q. 122. How as to the capsules?

A. Substantially the same—the same silver-colored capsules, substantially in form and size as the Arpad.

Q. 123. Can you produce any label of Hunyadi Arpad water which you can identify as used by the firm of Ignatz Ungar & Son or their authorized agents in the United States on the bottles of Hunyadi Arpad sold by said firm or agents in the United States prior to May 2, 1892, when you entered into the Ungar contract, and if so, please do so?

A. I have in my possession three labels of Hunyadi Arpad, and from my best recollection, the one I now produce was used by the Hunyadi Arpad either in 1889 or previous to 1889.

Mr. Coe: Counsel for defendant offers in evidence the Hunyadi Arpad label produced by witness, and it is marked "Defendant's Exhibit Hunyadi Arpad 1889 Label, J. A. S., ex'r."

A. (continued). The two other Hunyadi Arpad labels which I herewith produce, were used, to the best of my recollection during the years 1890, 1891 and part of 1892, prior to our acquiring the Ungar contract.

Mr. Coe: The Hunyadi labels produced by witness offered in evidence and marked "Defendant's Exhibits 1891 and 1892 Labels, J. A. S., ex'r," respectively.

Q. 124. And on what style of bottles and with what capsules were such labels used?

A. The style of bottles was exactly the same as the bottle I produced marked "Hunyadi Arpad bottle." The style of capsule to the best of my recollection is exactly the same.

546 Q. 125. In addition to the Hunyadi Arpad and Hunyadi Bela waters, you also sold, as I understand, under the Ungar contract of May 2, 1892, until such contract was terminated on July 6,

1893, by the firm of Andreas Saxlehner buying up said contract and cancelling the same, two other waters, called the "Victoria" and "Rakoczy Gyorgy" waters. Can you produce a bottle of such Victoria water which the Eisner & Mendelson Company sold under the said Ungar contract, showing the style of label, bottle and capsule on the same, and if so, please produce such bottle?

Mr. KNAUTH: Complainant's counsel objects to the question as improper, because, by way of recital referring to testimony or evidence which has not been given in the case, and arguing defendant's case without basis in fact, and not for the purpose of the question.

Mr. COE: Counsel for defendant disclaims any such intention in framing the question, and states that on the contrary the question is based on the Ungar contract and the testimony relating thereto, which shows that in addition to the Hunyadi Arpad and Hunyadi Bela waters, the said Eisner & Mendelson Company also imported and sold the said Victoria and Rakoczy Gyorgy water.

Mr. KNAUTH: Complainant's counsel specifically calls the attention of the court to that portion of the question in which the evidence is recited as establishing the fact that complainant had bought up defendant's contract for the Hunyadi Arpad springs, as to which fact no competent evidence has been given.

A. We also imported from the firm of Ignatz Ungar & Son and sold as agents for them, the Victoria water and the Rakoczy Gyorgy water. I herewith produce a bottle of the Victoria water.

Mr. COE: Counsel for defendant offers in evidence said bottle of Victoria water, and it is marked "Defendant's Exhibit Victoria Bottle, J. A. S. ex'r."

547 Q. 126. Was this water selling in the United States to your knowledge in the same style of bottles and under the same colored label and with the same style of capsules, prior to May 2, 1892, when you entered into the said Ungar contract?

A. To the best of my recollection I saw it in 1889 when I looked into all these matters, in substantially the same bottles and labels, and it may have been selling many years previous to that.

Mr. KNAUTH: Don't say "it may have been."

Q. 127. Down to the time you acquired the contract?

A. Yes, and thereafter. I first saw it in 1889. I may have seen it before, but I have no distinct recollection.

Q. 128. And, as I understand, from the year 1889, when you first saw this water, this Victoria water so sold in the United States, it continued to be so sold until May 2, 1892, when you entered into said Ungar contract, and thereafter, by your company?

A. Yes, sir.

Q. 129. Have you had this bottle of Victoria water marked "Defendant's Exhibit Victoria Bottle" in your possession since the year 1892 or 1893?

A. I positively had it in my possession since 1892 or 1893, and I

may have had it before that time. I believe it is one of the bottles obtained here before we acquired the agency.

Q. 130. Is there any mark by which you are able to say that this bottle is one which was imported and sold prior to your acquiring the Ungar contract, and if so, please state the same?

A. To the best of my recollection the labels which we imported had our name on as agents, and therefore I believe that this is a bottle that was imported prior to our acquiring the agency.

Q. 131. But so far as regards the three-paneled label and the colors thereof, style of bottle and capsule, such "Defendant's Exhibit Victoria Bottle" shows the same label, bottle and capsule, does it not, as those in which you imported the Victoria
548 water under the Ungar contract; am I correct?

A. Substantially the same.

Q. 132. Can you produce any bottle of the Rakoczy Gyorgy water, showing the style of label and so forth under which you sold said water under the Ungar contract?

A. I cannot produce a bottle, but I have saved a label of this water which I now produce, also a reproduction of the label which was used as a letter sheet by the firm of Ignatz Ungar & Son at Budapest. They wrote their correspondence on one side, and the fac-simile of this label is on the reverse side.

Mr. Coe: Counsel for defendant offers in evidence the first label of said water, and the same is marked "Defendant's Exhibit Rokoczy Gyorgy Label No. 1, J. A. S., ex'r."

Defendant's counsel also offers in evidence the other label produced by witness, and the same is marked "Defendant's Exhibit Rakoczy Gyorgy Label No. 2, J. A. S., ex'r."

Q. 133. In connection with what style of bottle and what style of capsules were said Rakoczy Gyorgy labels which you have produced used by you under the Ungar contract?

A. In substantially the same bottles and capsules in style and form as the Victoria water or the Hunyadi Arpad water.

Q. 134. In your previous testimony you have spoken of the Hunyadi Lajos as a water that was on the market and being sold in the United States at the time the Apollinaris advertisements, circulars and postal cards were issued and circulated in the year 1893 as you have testified: can you produce a bottle of such Hunyadi Lajos water showing the style of label, bottle and capsule in and under which said Hunyadi Lajos water was sold at that time?

A. I herewith produce a bottle of Hunyadi Lajos which has been in my possession for some years—I cannot exactly tell how long; but it so represents the general style of bottles and labels under
549 which this water was sold. The cork has been drawn from this bottle, and therefore the capsule destroyed, and another cork replaced, but the capsules were substantially the same as on the Hunyadi Matyas or Arpad or Janos, in style and form.

Mr. Coe: Bottle produced by witness offered in evidence, and the same is marked "Defendant's Exhibit Hunyadi Lajos Bottle, J. A. S., ex'r."

Q. 135. You have also spoken in your testimony of a Hunyadi Josef and Hunyadi Micklas waters as being sold in the United States at the time in 1893 when the Apollinaris Company published, issued and circulated the advertisements, circulars and postal cards hitherto referred to and produced by you in your testimony. Have you any bottles or labels of such Hunyadi Josef water?

A. I cannot exactly tell whether it was in 1893 that the Hunyadi Josef was selling here; it was either 1893 or 1894: to the best of my recollection it was in 1893. I have not a bottle of the Hunyadi Josef in my possession and cannot produce the same. The Hunyadi Micklas was selling in 1893 in Chicago; I have seen it there repeatedly and had a bottle in my possession, but I could not find it any more; I instigated a search; and if I find one I will produce it. This Hunyadi Micklas water was selling at the time in the same style of bottle as the Hunyadi Matyas, the Hunyadi Arpad, the Hunyadi Janos, the Hunyadi Lajos and all the rest of the Hunyadi waters, with the same colored label and general appearance.

Q. 136. Can you produce a style of label under which the Hunyadi Janos water was selling in Europe at the same time in or about the year 1893—at the time in 1892 when you entered into the Ungar contract, or about that time?

A. I herewith produce a label of the Hunyadi Janos as it was selling at that time and prior to that time in Hungaria and Austria and Germany.

550 Mr. Coe: Counsel for defendant offers in evidence the said Hunyadi Janos label, and it is marked "Hunyadi Janos European Label, J. A. S., ex'r."

Q. 137. Have you in your possession and can you produce a style of label under which the Hunyadi Arpad water was selling in the same countries, in Hungary and other countries in Europe, in the years 1892 and 1893 when you were selling the Hunyadi Arpad in this country under the Ungar contract of May 2, 1892?

A. I herewith produce a label of the Hunyadi Arpad under which this water was selling in the year 1892 and prior to that time in continental countries.

Mr. Coe: Label produced by witness offered in evidence by counsel for defendant and marked "Defendant's Exhibit Hunyadi Arpad European Label, J. A. S., ex'r."

Q. 138. Have you in your possession and can you produce a Hunyadi Matyas label showing the style of label in which the Hunyadi Matyas water was sold in Europe at the time and prior to the time when you entered into the Hunyadi Matyas lease of March 14, 1890, and, if so, please produce the same?

A. I herewith produce a label of the Hunyadi Matyas, under which this water was selling on the continental market at the time we acquired the lease, and continued to sell there for years after.

Mr. Coe: Defendant's counsel offers the said label produced by witness in evidence, and the same is marked "Defendant's Exhibit Hunyadi Matyas European Label, J. A. S., ex'r."

Q. 139. Have you in your possession and can you produce the style of label in which the Hunyadi Lajos water was selling in European countries in the years 1892 and 1893 at the time you have referred to when the Hunyadi Lajos was selling in the United States?

551 A. I produce a label of the Hunyadi Lajos water as it was selling on European markets, particularly in Hungaria in 1893.

Mr. COE: Counsel for defendant offers said label in evidence, and it is marked "Defendant's Exhibit Hunyadi Lajos European Label, J. A. S., ex'r."

Q. 140. Have you in your possession and can you produce any other Hunyadi Lajos label in addition to the label shown on the Hunyadi Lajos bottle heretofore marked in evidence today, and if so, please state how you obtained this label and where it was used and when?

A. I have had a label of Hunyadi Lajos in my possession when this water was first imported. I don't know whether that was in 1892 or 1893—but I had it taken off a bottle—soaked off a bottle, and have kept it ever since. I herewith produce said label.

Mr. COE: Counsel for defendant offers in evidence the label produced by witness, and the same is marked "Defendant's Exhibit Hunyadi Lajos First American Label, J. A. S., ex'r."

Q. 141. Have you in your possession and can you produce a Victoria label such as was used by the firm of Ignatz Ungar & Son in Hungary and other continental countries in connection with and on bottles of Victoria water, at the time when you were selling the Victoria water under the Ungar contract, and if so, please do so?

A. I herewith produce a label of the Victoria water under which this water was selling in Hungary and other continental countries at the time we acquired the agency and while we were selling in this country under the Ungar contract.

Mr. COE: Counsel for defendant offers said label produced by witness in evidence, and the same is marked "Defendant's Exhibit Victoria European Label, J. A. S., ex'r."

552 Q. 142. Have you in your possession and can you produce a label of the Hunyadi Laszlo water such as was used in Hungary and other European countries on bottles of Hunyadi Laszlo water sold in those countries at the same time that you were selling Hunyadi Laszlo water under your Hunyadi Laszlo arrangement or contract in the United States, and if so, please do so?

A. I herewith produce a label which was used in Europe on the Hunyadi Laszlo water at the time we acquired said agency and thereafter and during the time we were selling as agents for the Laszlo water here.

Mr. COE: Defendant's counsel offers in evidence said Hunyadi Laszlo label, and the same is marked "Defendant's Exhibit Hunyadi Laszlo European Label, J. A. S., ex'r."

Q. 143. Have you in your possession and can you produce a label of the Hunyadi Laszlo such as used by you as heretofore testified on Complainant's Exhibit Hunyadi Laszlo Bottle, in the United States, during the time you sold the Hunyadi Laszlo water under your Hunyadi Laszlo contract and if so, please do so?

A. I herewith produce a label of the Hunyadi Laszlo water, under which this water was sold by us in the United States under our contract.

Mr. COE: Defendant's counsel offers in evidence the red and blue marked Hunyadi label produced by witness and the same is marked "Defendant's Exhibit Hunyadi Laszlo American Label, J. A. S., ex'r."

Q. 144. What was the style of bottles and capsules in connection with which the said European Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad, Hunyadi Lajos, Hunyadi Laszlo and Victoria waters were sold in Europe?

A. In style, appearance, bottles and caps, substantially alike.

Q. 145. And the same as the bottles and caps in which the Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad, Hunyadi Laszlo, Hunyadi Lajos, Victoria, the Rakoczy Gyorgy, Micklas and
553 Josef were sold in the United States at the time that you have heretofore testified?

A. Substantially the same.

Adjourned to Wednesday, February 23, at 2 p. m.

SAXLEHNER
v.
EISNER & MENDELSON CO.

NEW YORK, *February* 23, 1898.

Adjourned to Saturday, February 26, 1898, at 11 a. m.

NEW YORK, *February* 26, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the direct examination of Mr. MORITZ EISNER.

By Mr. COE:

Q. 146. After entering into the Hunyadi Matyas lease in the spring of 1890, did you send out any special trade advertisements in addition to those you have previously referred to and put in evidence; and if so, please produce a specimen of such advertisements and state to whom you sent them out and the way in which you sent them out.

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. We had mailing slips which showed the label on one side in blue and red colors and on the other side the geographical location of the various springs, as well as a comparative chemical analysis

of the main constituents of the water. Those mailing slips we supplied in quantities to all our customers to be either enclosed in the mail or to be handed to their customers. I herewith produce three
554 of these mailing slips, one which we supplied to West & Truax, Toledo, Ohio, one which we supplied to Lambert & Loman, Detroit, Michigan, and one which we supplied to G. & R. McMillan, Detroit, Michigan.

Q. 147. What are the springs whose location is shown on one side of said slip and the analysis of which is given on said slip?

Mr. KNOUTH: Same objection.

A. The approximate location of the Hunyadi Janos, Hunyadi Matyas and Hunyadi Arpad, is shown on the one side; the comparative analysis of these three springs is also stated thereon.

Q. 148. How widely did you circulate similar slips among the trade in the United States and during what period?

Mr. KNAUTH: Same objection.

A. During the years 1890, 1891, 1892 and 1893 we circulated more than a quarter of a million of these slips as far as I can recollect.

The three slips referred to by the witness are offered in evidence by defendant's counsel and are marked "Defendants' Exhibits Hunyadi Matyas Mailing Slips Nos. 1, 2 and 3, Feb. 26, 1898, J. A. S., ex'r."

Q. 149. Was any objection or protest made by the Apollinaris Company, Limited, or on its behalf by any one connected with said company with reference to the distribution and circulation of similar slips; and if so, by whom, when, and under what circumstances?

Mr. KNAUTH: Same objection.

—. A representative of the Apollinaris Company, Limited, or their American agents, Charles Graef & Company, Mr. I. Haldenstein, called on me in or about the year 1892; I can't distinctly recollect whether it was in the early part of said year, but to my best recollection it was.

Q. 150. Where did he call?

A. At our office, at 6 Barclay street. He had one of the
555 mailing slips referred to in his hand, and he stated to me that, while he could have no objection to sending out the colored label mailing slip, he, or the Apollinaris Company, Limited—I can't tell exactly which way he expressed himself—objected to the comparative analysis on the other side, as said analysis was not in his view correct. We had some conversation on the subject, and I agreed that if he thought the analysis was not correct, he should either furnish me with a correct analysis or, if he preferred, I would eliminate the entire comparative analysis in future, particularly so as we were then negotiating about the acquirement of the Hunyadi Arpad agency. He was satisfied, and we agreed that we should in

future eliminate all comparative analysis from our mailing slips after all the slips that were printed at the time had been used up.

Q. 151. State whether or not the Eisner & Mendelson Company carried out this promise or agreement.

Mr. KNAUTH: Same objection.

A. Yes, sir; they after that had no more printed with the comparative analysis on.

Q. 152. Can you produce the kind of slips that you afterwards distributed, which took the place of the Hunyadi mailing slips you have produced, and if so, state when you commenced to distribute these slips?

A. I herewith produce a mailing slip which was distributed by us later on, shortly after all the former slips had been used up, probably the end of 1893, or the beginning of 1894, and which has been distributed up to date.

The slip produced by the witness is offered in evidence by defendant's counsel and is marked "Defendant's Exhibit Hunyadi Matyas New Mailing Slip, February 26th, 1898, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

556 The WITNESS: I wish to qualify the last answer, because there may have been some other slips that we sent out between the time and I cannot recollect now. I have not made a search or an investigation.

Q. 152½. On said "Defendant's Exhibit New Mailing Slip," appear the words "Ask for the Seal brand." To what do such words refer?

A. To the side label which is pasted over the main label on the bottles of Hunyadi Matyas water as shown on Complainant's Exhibit B.

Q. 153. When, or about what time did you commence to put such additional side label on the bottles of Hunyadi Matyas which you sold and why did you put such side labels on?

A. We began to put these side labels on, or similar ones, without reference to the Chicago exposition, in 1893, and they were put on as a special mark to identify the Hunyadi Matyas water sold by us.

Q. 154. Since you commenced to use such additional label, which I understand you put on as an additional mark of identification, have you continued to use such additional label on the bottles of Hunyadi Matyas water you have sold since?

A. Yes, sir.

Q. 155. Invariably?

A. Invariably.

Q. 156. That condition of affairs with reference to the sale of Hunyadi Matyas water with that Seal Brand label has continued, as I understand you, from some time in the year 1893 up to the present time and is still continuing?

A. Yes, sir.

Q. 157. Besides putting on this Seal brand on the bottles of Hunyadi Matyas water, which you sold commencing in the year 1893,

did you advertise the Hunyadi Matyas water under this additional mark of identification, and if so, can you produce any such advertisement?

A. We very often advertised it in the trade papers, calling particular attention to the Seal brand as a special mark of identification. I herewith produce a copy of the Druggists' Circular of Feb-
557 ruary, 1895, which shows the general substance of the advertisements which we had inserted in this and other trade papers.

Mr. KNAUTH: Objected to as immaterial.

Counsel for defendant offers in evidence the said advertisement produced by witness, and the same is marked "Defendant's Exhibit Hunyadi Matyas Seal Brand Advertisement, Feb. 26, 1898, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 158. I see in this advertisement that you use the following words: "Received the highest award at the World's Columbian exposition." Please state whether you exhibited the Hunyadi Matyas water at the World's Columbian exposition at Chicago, in the year 1893, and, if so, whether the said water received the award spoken of.

Mr. KNAUTH: Same objection.

A. We did exhibit in Chicago in 1893 at the World's Columbian exposition the Hunyadi Matyas water and received the award spoken of.

Q. 159. And said Hunyadi Matyas water was so exhibited in bottles with the main label and Seal Brand side label as is shown on Complainant's Exhibit B?

A. It was exhibited with the main label and in bottles just as shown on Exhibit B, but may not have had the side label on at that time.

Q. 160. Since the time that you commenced in 1893 to use this additional Seal Brand label, has the Hunyadi Matyas water been known in the trade by the name "Seal brand" in connection with Hunyadi Matyas, and if so, in what way does the trade ask for the same?

Mr. KNAUTH: Objected to as incompetent.

A. The bulk of the trade asks for the Matyas Seal brand or as "Hunyadi Matyas," or often as simply the "Seal brand."

Mr. KNAUTH: Same objection.

558 Q. 161. So that, as I understand you, the Hunyadi Matyas water is sometimes called among the trade "Hunyadi Matyas," sometimes "Hunyadi Matyas Seal brand," and sometimes "Seal brand;" am I correct?

Mr. KNAUTH: Same objection and as leading.

A. Yes, sir.

Q. 162. Has the Eisner & Mendelson Company, since the period

when they commenced to put this Seal brand on, received orders showing these three modes of calling for the Hunyadi Matyas water, and if so, to what extent have the words "Seal brand" been asked for in these orders?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir, to a large extent.

Q. 163. Then as I understand by your last answer, the orders of the Eisner & Mendelson Company since the year 1893 have called for to a large extent the "Seal brand," as the alternative name for the Hunyadi Matyas water; am I correct?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 164. You have substantially stated in your *your* previous examination that, during the years 1892 and 1893, you sold Hunyadi Matyas water, Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo water under the Hunyadi Matyas lease, the Ungar contract and the Laszlo contract; was there any confusion among the trade in distinguishing these waters from each other to your knowledge and give your experience on that point?

Mr. KNAUTH: Objected to as incompetent.

A. No confusion whatever. The trade distinctly called for either Hunyadi Matyas, Hunyadi Arpad, Hunyadi Laszlo or Hunyadi Bela whichever they preferred to purchase under the surname
559 Matyas, Bela, Arpad or Laszlo with the general name Hunyadi prefixed.

Mr. KNAUTH: Same objection to the answer.

Q. 165. Look at the bottle now shown you, marked Complainant's Exhibit Siegel-Cooper, No. 1, and state what it is and what it contains?

A. This is a bottle of Hunyadi Matyas water drawn from spring No. 3, which is a weaker spring than spring No. 2, which we constantly imported and which is our standard importation.

Q. 166. Please state when you imported this and to what extent and when you ceased to import the same?

A. My recollection is that we imported it in the spring of 1896 only for one or two months, a few hundred cases, and then ceased to import the same. I had the dates looked up on the books and I have mislaid the memorandum, but I can state exactly at the next meeting. My recollection is that they were imported in the spring of 1896.

Q. 167. Then as I understand you, you only imported this during one or two months in the spring of 1896 and never imported any of such waters so labeled and marked since that time and ceased to sell the same soon thereafter?

—. My best recollection is that we imported a few hundred cases in the spring of 1896 and then ceased to import the same, but sold

what we had imported during that time, during 1896 and probably some time in 1897. I think we ceased to sell in 1896.

Q. 198. Can you state, approximately, how many bottles of Hunyadi Matyas water the Eisner & Mendelson Company has sold since it commenced to sell said water in the spring of 1890 up to the present time?

A. It must be over two million bottles or approximately that number.

Q. 199. Can you state, approximately, what amount of money the Eisner & Mendelson Company has spent in advertising Hunyadi Matyas water since the spring of 1890, when it entered into the Hunyadi Matyas lease with Mattoni?

A. At least $25,000.

560 Q. 200. Can you state approximately how many bottles of Hunyadi Arpad water the Eisner & Mendelson Company sold while they were sellers of the Hunyadi Arpad water under the Ungar lease?

A. During the time of our contract, from 1892 to 1893, and whatever stock we had left after the springs were bought up by Saxlehner; we must have sold at least half a million bottles.

Q. 201. Can you state of your own knowledge whether or not the Hunyadi Arpad water prior to your entering into the said Ungar contract of 1892, was sold in the United States in previous years to a considerable or large extent, and if so, please state what personal knowledge you have on the subject?

A. The Hunyadi Arpad, prior to the time when we acquired the agency, sold to a very large extent. I investigated the sale when we acquired the agency and went over the accounts to satisfy myself as to the number of cases they had been selling, because we had to agree to keep the sales of both waters alike, and it was very important for me to know the exact sale. My recollection is that the year prior to our acquirement of the agency they sold three hundred and fifty thousand to four hundred thousand bottles of Hunyadi Arpad.

Mr. KNAUTH: Objected to as incompetent.

Q. 202. Can you state approximately how many thousand bottles of Hunyadi Bela water were sold by the Eisner & Mendelson Company during the time of the Ungar contract?

A. I have not looked over the sales of the Bela water recently, but to the best of my recollection there were from forty to fifty thousand bottles sold.

Q. 203. With reference to the Victoria water and the Rakoczy Gyorgy water, can you state approximately how many bottles were sold?

A. I can only state approximately, as I haven't looked over these affairs for years. My best recollection is there must have been over ten thousand bottles of the Victoria and probably the same amount or a little less of the Rakoczy Gyorgy.

561 Q. 204. And this during the time of the Ungar contract, as I understand?

A. During the year we held the Ungar contract, and thereafter whatever stock there was left.

Q. 205. Please state approximately how many bottles of Hunyadi Laszlo water were sold by the Eisner & Mendelson Company during the time it imported and sold such water under the Hunyadi Laszlo arrangement you have testified to.

A. At least 50,000 bottles; it might have been double that amount, and I cannot exactly state. Approximately, I will say that it was at least 50,000 bottles.

Q. 206. Prior to the commencement of this suit, did the Eisner & Mendelson Company sell Hunyadi Matyas water to the firm of Acker, Merrall & Condit, of New York city, and, if so, can you produce any orders for such Hunyadi Matyas water received from said firm which the Eisner & Mendelson Company filled?

A. I herewith produce three orders of Acker, Merrall & Condit for Hunyadi Matyas water: one order, No. 1379, dated August 31, 1896; one order, No. 1663, dated February 7, 1896, and one order, No. 12520, February 2, 1897—all by the same firm. These orders were filled in the regular routine of business.

The orders produced by the witness are offered in evidence by defendant's counsel and marked "Defendant's Exhibit Acker, Merrall & Condit Orders, Nos. 1, 2, and 3, Feb. 26, 1898, J. A. S., ex'r."

Q. 207. You have referred in your previous examination to your knowledge that a Hunyadi Lajos water and a Hunyadi Vilmos water were sold in the United States between the years 1894 and 1897; can you produce a bottle of said Hunyadi Vilmos water showing the label affixed to the bottles of such water and the capsules thereon, and, if so, please produce the same.

Mr. KNAUTH: Objected to as immaterial and irrelevant.

562 A. Yes, sir; I herewith produce a bottle of the Hunyadi Vilmos water which was sold in the United States between the years 1894 and 1897, which shows the general style of label, bottle and cap.

Q. 208. How long have you had this bottle which you produce in your possession?

Mr. KNAUTH: Same objection.

A. I cannot exactly tell, but maybe for two or three years.

Defendant's counsel offers the bottle produced by the witness in evidence, and it is marked "Defendant's Exhibit Hunyadi Vilmos Bottle, Feb. 25, 1898, J. A. S., ex'r."

Q. 209. You have also in your previous testimony referred to the Hunyadi Lajos water being sold in the United States between the years 1894 and 1897: Can you produce a bottle of such water showing the label, capsule, and style of bottle in which such Hunyadi Lajos was sold during the period you referred to, and if so, please produce such bottle?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. I herewith produce a bottle of Hunyadi Lajos which was sold in the United States between the years 1894 and 1897; this bottle has been in my possession for either two or three years, it may be four years.

The bottle referred to is offered in evidence by defendant's counsel and is marked "Defendant's Exhibit Hunyadi Lajos Bottle, Feb. 26, 1898, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Cross-examination by Mr. KNAUTH:

X Q. 210. When did the present Eisner & Mendelson Company, organized under the laws of West Virginia, commence to do
563 business?

A. I think it was in 1892 or 1893.

X Q. 211. Did it commence immediately after it was incorporated?

A. Yes, sir.

X Q. 212. Was its incorporation a reincorporation of the concern of the same name existing theretofore, or did the defendant purchase the assets of the former Eisner & Mendelson Company?

A. It acquired all the assets of the former company and was subject to its liabilities.

X Q. 213. Was the amount of capital stock of the defendant the same as the amount of capital stock of the Eisner & Mendelson Company, which was theretofore incorporated under the laws of the State of Pennsylvania?

A. I cannot tell now, but I know as a fact that every stockholder in the former corporation got the same amount of stock in the new corporation. If the capitalization of the new corporation under the new charter was incorporated at a higher capital, the additional capital stock had to be bought by each stockholder for cash.

X Q. 214. Were there additional stockholders in the new company who had not been stockholders in the old company?

A. No, sir.

X Q. 215. It was, however, formed of the same individuals?

A. I think the same individuals without any material change.

X Q. 216. Were the officers the same?

A. The officers were the same.

X Q. 217. What has become of that Pennsylvania corporation named Eisner & Mendelson Company?

A. It was thereupon liquidated.

X Q. 218. Has it ever been dissolved by decree of court?

A. Yes, sir.

X Q. 219. When was it dissolved?

A. Shortly thereafter, by the decree of the supreme court of Pennsylvania. I did not attend to that matter myself and I cannot tell, but my best recollection is that it was dissolved by the decree of the court at Philadelphia.

564 X Q. 220. How long have you lived in the United States?

A. Since the year 1868 or 1869.

X Q. 221. Where were you born?
A. In Austria.
X Q. 222. In what part of Austria?
A. I was born in Vienna.
X Q. 223. When were you born?
A. In 1851.
X Q. 224. Did you live in Vienna from the year 1851 until 1869
A. The best portion of that time.
X Q. 225. When you came to the United States of America i
1869, where did you reside here?
A. In Fourteenth street.
226 X Q. In the city of New York?
A. Yes, sir.
227 X Q. How long did you continue to reside in the city of Ne
York?
A. Not very long, a few months; I stopped at the house of m
uncle.
228 X Q. Where did you go then?
A. To Philadelphia.
229 X Q. And that was in what year?
A. If I recollect right, in 1870.
230 X Q. How long did you reside in Philadelphia from tha
time on?
A. Till 1878, I believe, and thereafter I was a short time, about
year, in New York.
231 X Q. That would be 1879?
A. Somewhere thereabouts; I can't tell exactly.
232 X Q. Then where did you go?
A. Back to Philadelphia.
233 X Q. And then you resided in Philadelphia how long?
A. Up to 1886 or 1887.
234 X Q. In 1886 or 1887, where did you go?
A. Moved to New York.
235 X Q. And since that time you have resided in New York?
A. Yes, sir.
236 X Q. Did you know anything of Hunyadi water until o
before the year 1869, when you left Vienna?
A. I can't recollect.
237 X Q. You have no recollection of having heard the nam
at all?
A. No, sir; not at that time.
238 X Q. Had you ever heard of Hunyadi Janos water at tha
time?
A. Not at that time.
565 239 X Q. What was your business or occupation when yo
left Vienna?
A. I was occupied in the wholesale drug business.
240 X Q. What was the business; whose business was it?
A. First with Ferdinand Roche Droguerie, at the corner o
Kohlmarke, and afterwards with J. Mandelblueh, in the old cit
hospital.

241 X Q. Were both these houses in which you were employed in Vienna wholesale drug houses?

A. On that general principle, selling drugs and chemicals.

242 X Q. What were you doing in the employ of those houses?

A. An apprentice and afterwards a clerk.

243 X Q. Did you have any acquaintance with Hungarian bitter waters at that time?

A. None whatever.

244 X Q. You never saw a bottle of Hungarian bitter waters at that time?

A. I do not recollect having seen any.

245 X Q. When you came to the United States in 1869, when first did you see any Hunyadi Janos water?

A. In the year 1870, I believe.

246 X Q. That was in New York?

A. In Philadelphia.

247 X Q. Do you remember where you saw it?

A. I have no recollection about it except faintly; I may have seen it. I saw the advertisements.

248 X Q. What advertisements do you mean?

A. Of the Hunyadi Janos.

249 X Q. What advertisements do you mean?

A. Newspaper advertisements of the Apollinaris Company which I saw. I do not know whether that was in 1870, or 1875 or 1876. It is a hard thing to recollect twenty or twenty-five years back.

250 X Q. What I would like to know is this, how did the first bottle of Hunyadi Janos water which you saw in this country look; did it have a red and white label or did it have a red and blue label?

A. The firm I was with and afterwards succeeded sold Hunyadi Janos in bottles with a red and white label at one time, and if I recollect right that was the first bottle that I sold.

566 251 X Q. What was that firm?

A. Cramer & Small.

252 X Q. Where were Cramer & Small doing business?

A. At 300 Race street, Philadelphia.

253 X Q. How long were you in their employ?

A. I was there from 1870 till the end of 1874 and then again from 1879 or 1880 until I succeeded them.

254 X Q. You succeeded them in business afterwards?

A. Yes, sir; I succeeded them either in the fall of 1880 or 1881.

255 X Q. When you first entered the employ of Cramer & Small in Philadelphia, did they deal then in any Hungarian bitter waters?

A. I cannot recollect how whether they did or not at that time.

X Q. 256. Do you recollect whether between the years 1870 and 1874 they dealt in Hungarian bitter waters?

A. I have no recollection prior to 1874 on any of these subjects.

X Q. 257. Why is it that you have no recollection prior to 1874?

A. Because I was prescription clerk and had nothing to do with the sales over the counter or anything else. I simply prepared the

prescriptions; we had a separate prescription department, and that was all I was attending to.

X Q. 258. That lasted how long?

A. Until I left them about the end of 1874; I married in December, 1874, and I started business for myself in 1875.

X Q. 259. Under what name and with whom did you start in business in 1875?

A. Alone.

X Q. 260. What was the character of your business then?

A. Druggist.

X Q. 261. You mean a retail druggist?

A. Yes, sir.

X Q. 262. And you continued to be a retail druggist in Philadelphia for how long?

A. For one or two years, I believe.

X Q. 263. Did you sell any Hunyadi Janos water as a retail druggist?

A. I do not recollect at that time whether I did or not sell Hunyadi water. I have a very faint recollection of that time.

X Q. 264. Is your recollection clear that the first bottles of
567 Hunyadi Janos water which you saw in this country were red and white and not blue and white?

A. That is my recollection.

X Q. 265. Do you remember where you saw those first bottles, whether in your own drug store or where?

A. I believe at Cramer & Small's.

X Q. 266. That must have been then prior to 1875?

A. No, it may have been prior to 1880.

X Q. 267. You mean when you re-entered their employ?

A. When I re-entered their employ with the prospect of succeeding them.

X Q. 268. Now, you haven't yet accounted for the years 1877 until 1879 or 1880?

A. It must have been in 1876 or 1877 that I went abroad in order to obtain the Hoff agency, and I was at that time trying to introduce that article here, but for a lack of capital had to postpone that arrangement, and for a time clerk with Eimer & Amend of this city for about a year, as prescription clerk, and then went back at the solicitation of Cramer & Small of Philadelphia and entered their employ again. It may have been I saw it at the time I was with Amend.

X Q. 269. Do you remember whether you saw any Hunyadi Janos water at Eimer & Amend's?

A. I cannot recollect; I may have seen it. I think it was in 1879 that I was with Eimer & Amend.

X Q. 270. Had you ever seen any Hungarian bitter water in bottles previous to the time that you saw Hunyadi Janos bottles here?

A. At that time I refer to, the bitter water that was mostly selling and best known in Vienna was the Friederichschall and the Pullna water. I recollect having handled that at the time.

X Q. 271. Are these two waters which you have just named Hungarian bitter waters?

A. They are not; they are bitter waters.

X Q. 272. I was asking you whether you had seen any Hungarian bitter waters previous to the time that you saw Hunyadi Janos water?

A. I don't think I had; I don't recollect.

X Q. 273. Now state what your duties were when you re-
568 entered the employ of Cramer & Small in the year 1880; I mean what your duties in their business were?

A. As general manager or first clerk. I am not certain whether it was in 1879 or 1880 that I re-entered the employ of Cramer & Small.

X Q. 274. Were Cramer & Small at that time dealing in any Hungarian bitter waters?

A. They had a very big business; they didn't handle any specialty, no patent medicine of any kind, and their business was simply and purely prescriptions. It was the largest prescription business in Philadelphia at this time and they had a limited space and their quarters were very small and I don't think they handled any mineral waters. If they did, I don't know. After I succeeded them, I handled Hunyadi Janos water.

275 X Q. When was it that you succeeded them?

A. It was either in the fall of 1880 or the beginning of 1881.

276 X Q. Did you retain the same store at that time, or did you move to other quarters?

A. We extended our quarters and rented the store next door and broke through the wall.

277 X Q. And then you commenced to add Hungarian bitter waters to the stock of goods?

A. Commenced to add various stocks of goods, mineral waters in general as well as proprietary goods and fancy goods and things that they had not handled.

278 X Q. It was then that you commenced to sell Hunyadi Janos water?

A. At that time we sold Hunyadi Janos water.

280 X Q. What labels did the bottles of Hunyadi Janos water which you sold bear; what was the color of the labels?

A. At that time I think it was red center field with a blue label. I am not sure now whether it was red and white or blue and red; I can't tell exactly.

281 X Q. Where did you procure these Hunyadi Janos waters?

A. From the wholesale trade.

282 X Q. Did you procure them directly from the Apol-
569 linaris Company, Limited, or the agents of the Apollinaris Company, Limited, in New York city?

A. No, sir.

283 X Q. You mean you gave your order to a jobber or wholesale dealer in Philadelphia?

A. In Philadelphia or in New York. We may have bought from Scherer, who made mineral waters his specialty.

284 X Q. You don't remember specially of whom you bought this Hunyadi Janos water at the time?

A. No, I paid no particular attention to it.

285 X Q. Was it on sale by various parties?

A. I don't know.

286 X Q. You don't recollect?

A. We had it on sale; I don't know who else sold it.

287 X Q. I mean wholesalers?

A. I presume so.

288 X Q. But you don't recollect?

A. I don't know.

289 X Q. Did you sell it over the counter in your drug store?

A. I may have, I can't tell, because then I did not pay attention to the counter.

290 X Q. Do you remember who was then in your employ attending to the sales over the counter?

A. In 1880?

291 X Q. Yes?

A. Yes, I think a young man by the name of Meincke.

292 X Q. What has become of him?

A. I have no idea.

293 X Q. Do you know when he left you?

A. In 1884 or 1885, I believe it was at that time.

294 X Q. Were you at that time selling any other Hungarian bitter water except the *the* Hunyadi Janos?

A. I don't know.

295 X Q. You have no recollection about that?

A. I have no recollection on that subject. I paid particular attention at that time to raw drugs and chemicals which we began to import and sell wholesale in very large quantities. I paid particular attention to that branch.

296 X Q. Did you continue to operate this business or store up to the year 1886?

A. I don't recollect now how long. I believe we sold out
570 the retail portion—that is the retail drug store—in 1885; it may have been 1884, or it may have been the beginning of 1886, I cannot exactly tell.

297 X Q. Did you at that time subscribe for and take certain trade papers?

A. Yes, I think I did.

298 X Q. Do you recollect which?

A. I think it was the Druggists' Circular and the German-American Apothecary paper.

299 X Q. Did you not find in both of these papers advertisements of the Hunyadi Janos water as sold by the Apollinario Company in this country?

A. I may have; I don't recollect it distinctly, because I paid no particular attention to that branch of the business at that time.

300 X Q. Can you state how large your sales of Hunyadi Janos water were from 1880 until 1885 or 1886?

A. I cannot state; if there were any, they must have been very small.

301 X Q. What has become of the books of your concern for those years?

A. I have no idea.

302 X Q. When did you see them last?

A. I suppose when we sold out the retail store.

303 X Q. To whom did you sell the retail store?

A. Emil Graff.

304 X Q. Is he still in Philadelphia?

A. I do not know.

305 X Q. When did you last know of him or his business?

A. When he couldn't pay what he owed us.

306 X Q. When was that?

A. Some years back, maybe four or five years back.

307 X Q. Do you know what has become of him?

A. I heard that he was clerking in some drug store, I don't know where.

308 X Q. In Philadelphia?

A. I don't know whether it is in Philadelphia or not.

309 X Q. Do you know what has become of his partner, Ballenbaum?

A. Yes, he is connected with some chemical house in Philadelphia either as partner or employed by them.

310 X Q. Do you know what house?

571 A. I do not; I haven't seen him or heard anything about him for years.

311 X Q. When did you first make the acquaintance of Mr. Mendelson, who, as I understand it, is the treasurer of your company?

A. In 1880 or 1881.

312 X Q. When did you first go into business connection with him?

A. I think it was either in the winter of 1881 or in 1882.

313 X Q. Did you go into partnership?

A. Yes, sir.

314 X Q. Did you and he continue to operate the business which you have just described, which you had bought of Cramer & Small?

A. Yes, sir.

315 X Q. Do you know where Mr. Mendelson was born?

A. He was born in Austria.

316 X Q. Do you know when?

A. He is about the same age as I am; only a few months' difference between us.

317 X Q. Do you know when he came to the United States?

A. As a little boy.

318 X Q. Did you sell any other bitter waters besides Hunyadi Janos between 1880 and 1885 or 1886?

A. Do you mean Hungarian bitter waters?

319 X Q. No, any other bitter waters?

A. Yes, if I recollect right we sold Ofner Rockozy, which was Hungarian bitter water, the Friederichshal water and the Pullna

water; I don't know whether we sold Franz Joseph at this time or not; I can't recollect distinctly.

320 X Q. Were you acquainted with the Franz Joseph at that time?

A. No particular acquaintance with it.

321 X Q. Except that you had seen the bottles?

A. I had heard of it or may have seen the bottles.

322 X Q. Can you state who is the owner of the spring whose waters were sold under the name of Ofner Rackozy at that time?

A. I haven't the remotest idea.

323 X Q. Where did — get that water?

A. I may have got it from a general mineral-water place
572 or a wholesale drug store; I can't tell. I didn't pay any particular attention to it.

324 X Q. Do you remember under what kind of a label it was sold?

A. I could not tell.

325 X Q. You don't rem-ber anything about it?

A. No; I don't know under what label the Frederichschal water was sold, only I distinctly recollect having sold that.

326 X Q. You knew that it was a Hungarian bitter water and that was all?

A. I knew that it was a Hungarian bitter water and was being called for and sold.

327 X Q. Do you — where it came from?

A. I hadn't the remotest idea; I didn't know at that time.

328 X Q. Do you know now where it came from?

A. Now I do know; that is, I don't know whether this came from there, but I knew where the Ofner Rockozy spring is located.

329 X Q. Can you state from your present knowledge where it is located?

A. Near Buda Pesth.

330 X Q. Is it located within the city limits of Buda Pesth?

A. I don't know whether the city limits extend that far, but it is within a radius of ten miles where all these Hungarian bitter-water springs are.

331 X Q. How long did you continue to show this Ofner Rackozy bitter water in this market?

A. I can't tell; I paid so little attention to it that I have hardly the faintest recollection in my mind on that subject.

332 X Q. Did you have any knowledge of the chemical constituents of the various bitter waters which were on the market in the United States in the year 1889?

A. Personal knowledge?

333 X Q. Yes.

A. Only from what I saw printed in the analysis of these waters; I myself made no analysis of them.

334 X Q. At that time did you know which of those bitter waters which were known to you then might be the most preferable?

A. From my investigations in books on mineral waters
573 that I had made, I found the Hunyadi Matyas to be the most

preferable, containing more of the main constituents of the Hungarian bitter waters.

335 X Q. I am now speaking of 1889 and of the United States. Did you know the Hunyadi Matyas water in 1889 in the United States?

A. No, but I had investigated it abroad.

336 X Q. I am not speaking of your investigations abroad, but previous to the time when you went abroad, did you know anything of the Hunyadi Matyas water then?

A. Yes, I knew something. Once, when I was in Vienna in 1878, I think, or thereabouts, Mr. Mattoni called my attention to the Hunyadi Matyas water.

337 X Q. How did he call your attention to it?

A. I was introduced to him by Otto Mass, vice-consul of the United States at that time, since deceased, and Mr. Mattoni wanted me to take the sale of various waters for the United States, but I was then negotiating or had negotiated for the agency of the Hoff's malt extract and I could not undertake it at that time. That was the first time my attention had been drawn to Hunyadi Matyas and I had not paid any more attention thereto or to any Hungarian mineral waters or any mineral waters until the acquirement of the Carlsbad agency by us in 1886.

338 X Q. You have mentioned that Mattoni wanted you to take the agency for other springs; what other springs did he mention?

A. I don't know the springs that he owned, amongst which was the Hunyadi Matyas.

339 X Q. Why and how is it that among those springs you recollect only the Hunyadi Matyas spring?

—. I have no other particular recollection about that except that my attention was drawn to his springs at the time, amongst which was that one and others.

340 X Q. Which others?

A. I think the St. Istvain, the Szecheny, and there may have been some others; I don't recollect.

Adjourned to Monday, February 28, 1898, at 2 p. m.

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SAXLEHNER
v.
EISNER.

NEW YORK, *February* 28, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the cross-examination of MORITZ EISNER.

By Mr. KNAUTH:

341 X Q. Did the first interview which you have described which you had with Mattoni in 1878 take — in Vienna or Buda Pesth?

A. To the best of my recollection in Vienna.

342 X Q. Did you at that time—I mean in 1878—go to Buda Pesth at all, to visit any springs?

A. No, sir.

343 X Q. When did you first go to Buda Pesth to visit any bitter-water springs?

A. In 1889.

344 X Q. That was at the time when you made the arrangement with Mattoni to which you have testified in your direct examination?

A. Yes, sir.

345 X Q. Were you acquainted at that time, in 1889, with any bitter waters sold by Mattoni in the United States of America?

A. No, not particularly. As I stated in my direct examination, I paid no attention to the Hungarian mineral-water trade previous to that time.

346 X Q. When you made this first contract with Mattoni on July 30, 1889, where were you and Mr. Mattoni?

A. I don't know whether the contract was made in Giesshuebl or in Vienna without referring to the contract.

X Q. 347. Will you please refer to the original exhibit, the first contract which you have offered in evidence and state whether you can answer the question now?

A. From the contract it would appear that I was at that time in Giesshuebl where the contract was signed.

X Q. 348. Is that your recollection?

A. I have only a faint recollection of it; it is a matter of ten years or nearly ten years.

575 X Q. 349. I notice that this first contract states in the first paragraph that Mattoni granted to your company the sole agency for the United States and Canada for the sale of his Hungarian bitter waters for the term of twenty years from September 1, 1889; is that contract still in force?

A. The 1890 contract took the place of this contract, but this contract was not absolutely cancelled. There was an oral understanding that the other contract should take its place.

X Q. 350. There never was any cancellation in writing of this first contract?

A. No cancellation in writing; it may have been spoken about. There was no formality undergone to cancel this contract.

X Q. 351. In this first contract Mattoni agreed not to sell or consign his Hungarian bitter waters during the time of this contract to any other concern in the United States but yourself. Did he act upon that letter long after the contract of 1890 had been made?

A. He acted in good faith.

X Q. 352. That is, you mean he did not?

A. He did not consign to our knowledge to any one in the United States.

X Q. 353. Has that been your relation with him up to the present time?

A. It has been our relation with him up to the present time.

X Q. 354. And that has been your understanding, that you were the sole parties representing the bitter waters here?

A. Yes, sir; that is if he would take it as granted that this contract would be still in force. I do not know now how we would stand in case — would consign any of his other springs here to any other party. I haven't given the matter any thought.

X Q. 355. He never attempted that, did he?

A. I do not think he ever attempted it. He may have done so without our knowledge.

X Q. 356. You say that this first contract was practically supplanted by the contract or lease of 1890?

A. Yes, sir.

576 X Q. 357. How did you agree upon this contract with Mattoni; did you go personally to arrange the matter with him or was it arranged by correspondence?

A. I think, if I recollect right, Mr. Mendelson was abroad in 1890 and arranged the matter and brought the draft of the agreement over with him and it was signed here and agreed upon.

X Q. 358. You did not go abroad in 1890?

A. I did not go abroad in 1890.

X Q. 359. Are you sure that it was not arranged by correspondence?

A. I am sure on that point.

X Q. 360. I also notice that in this first contract your company agreed not to work for or assist any other bitter-water spring during the time of the contract. Did you consider yourself bound to that agreement after the lease of 1890?

A. I cannot tell how we looked upon that, because shortly after we had some understanding with Mattoni that we arrived at that we should handle whatever bitter waters we liked.

X Q. 361. When did you arrive at that understanding?

A. At the time we made the Ungar contract in 1892.

X Q. 362. How did you arrive at the understanding with Mattoni?

A. I talked it over with him at the time.

X Q. 363. At Buda Pesth?

A. No, in Vienna, in his office in Vienna.

X Q. 364. When you entered into this contract of 1889, did Mattoni show you what bitter waters he had for sale and which should be covered by the contract made between you and him?

A. I believe we went over the list of waters, and if I recollect right, he showed me the various labels of bitter waters which he was selling.

X Q. 365. Can you state what labels he showed you?

—. The Ofner Koenigs bitter water, the same as the label which I now produce on page 38 of the Exhibit Book, the Graf-stefan Sczechenyi, as shown on page 37 of the Exhibit Book, the Franz Deak, as shown on page 40 of the Exhibit Book, the Koenigen Elizabeth Balzbadquelle, as shown on the Exhibit Book,

577 page 36, the Szent Istvan, as shown on page 35 of the Exhibit Book, and the Hunyadi Matyas, as shown on page 33 of the

Exhibit Book. There were some others of which I haven't got the labels.

X Q. 366. Did you give Mr. Mattoni an order for a quantity of these various bitter waters then and there?

A. We did not want to handle a variety of bitter waters, and at that time I picked out the Ofner Koenigs bitter water and gave him an order, I think, for a quantity of this water.

X Q. 367. How much?

A. I can't recollect now; maybe a small quantity only, probably 130 or 150 cases or probably more. It is not likely that it was less than one car-load.

X Q. 368. How much of such water did you import from July, 1889, until the contract of lease was made in 1890?

A. I cannot tell exactly; maybe 25,000 bottles.

X Q. 369. Your books will show it, will they?

A. Yes, sir; if I can find the books at that time, I will be pleased to state.

Mr. KNAUTH: I request you to bring the books the next time which will show that fact.

The WITNESS: It is ten years back and the Philadelphia books I think I haven't got but I will make a search for you. Probably I might find it among the correspondence.

X Q. 370. Can you state from recollection?

A. My best recollection is that there were over five to six hundred cases imported; it may have gone up to one thousand cases; that would be about 50,000 bottles.

X Q. 371. Is that the best of your recollection?

A. That is the best of my recollection.

X Q. 372. Under what label did you import this water into the United States?

A. Under the label "Royal Hungarian bitter water," which is a translation of the words "Koenigs bitterwasser," as it appeared on the German label.

578 X Q. 373. Did you or Mattoni use one of the six labels which you have pointed out on this water or was a new label devised for it?

A. A new label was devised for it for the American market.

The six labels identified by the witness as in the possession of Mattoni are marked for identification Mattoni's 1889 Labels, Nos. 1, 2, 3, 4, 5, and 6, Feb. 28, 1898, J. A. S., ex'r.

X Q. 374. Who devised this label?

A. I believe I did.

X Q. 375. Where did you do it?

A. I can't tell whether I did it there or here.

X Q. 376. If you devised it here, how did you send it to Mr. Mattoni?

A. I may have sent him a general idea or a general draft of the label.

X Q. 377. Did you give him any instructions to put that label on the bottles?

A. I presume so.

X Q. 378. Is it your recollection?

A. I have no distinct recollection about it. My faint recollection is that I may have told him to print it in English in the front and therefore changed the words "Ofner Koenigs bitterwasser" into "Royal Hungarian bitter water."

X Q. 379. Have you still any bottles of those first importations in your possession?

A. I have not.

X Q. 380. Is the bottle which I now show you a bottle of the water as imported between 1889 and 1890 (showing witness bottle of vater)?

A. This appears to be the style of bottle and label.

X Q. 381. Have you examined it carefully so as to refresh your memory?

A. I cannot tell exactly. This appears to be one of the bottles.

X Q. 382. Where was that label printed?

A. I think it was printed in Hungary.

X Q. 383. Di- you cause any such labels to be printed here?

A. I don't think so.

X Q. 384. You have no recollection of that?

A. I have no recollection of that.

X Q. 385. I notice that this label contains on each panel of the label and also on the white strip underneath a reference to
579 the Eisner & Mendelson Company, New York, sole agents for U. S. and Canada. Was that printed on all such labels as you received them in the years 1889 and 1890 until your contract of lease was executed?

A. I cannot tell; I presume so, but I have no definite recollection on that subject.

X Q. 386. Was there any change made in this label until the contract of lease was executed?

A. I cannot tell, Mr. Knauth.

X Q. 387. Your recollection is that the bottles came in with labels of this kind until then?

A. That is my recollection.

Complainant's counsel offers the bottles referred to in evidence and the same is marked "Complainant's Exhibit Royal Hungarian Bitter-water Label, Feb. 28, 1898, J. A. S., ex'r."

X Q. 388. I notice that the capsule on the neck of this bottle contains the inscription "Mattoni & Wille Ofner Konigs bitterwasser." Did you design that capsule?

A. No.

X Q. 389. Was that the same capsule as had been used by Mattoni & Wille theretofore?

A. I presume so.

X Q. 390. Do you know whether it had been used before?

A. I had paid no particular attention to it.

X Q. 391. Did you pay any attention to the head of the king which was impressed upon the capsule at the time?

A. No.

X Q. 392. What did you do to sell the water in the United States?

A. We sent out our agents, trying to introduce the water, and I believe we gave some samples to physicians and hospitals, but the time was too short. We acquired the agency in 1889 and shortly after my return in that year, in the summer of 1889, I looked into these Hungarian bitter-water matters as they were on the market in the United States and came to the conclusion shortly thereafter that we would import the Hunyadi Matyas water provided we could make some good arrangement with Mattoni whereby we could secure that trade under reasonable conditions for our-
580 selves, and the negotiations were then entered into between Mr. Mattoni and Mr. Mendelson personally.

X Q. 393. That is another matter; I don't ask you about that; I ask you what you did to sell this water. Did you advertise this Royal Hungarian bitter water of Mattoni?

A. Just as I stated, it was too short a time to enter into any expense.

X Q. 393. I want to know whether you advertised it?

A. I can't tell; we may have advertised it.

X Q. 394. Do you recollect whether you advertised it?

A. We did with price-lists, surely. Our price-list then went all over the United States.

X Q. 395. Do you mean you put it in your price-list?

A. I may have given it special space even in our price-list at that time.

X Q. 396. Do you recollect whether or not you did?

A. I can't recollect distinctly.

X Q. 397. Did you advertise it in the public papers?

A. No, sir.

X Q. 398. Did you advertise it in trade papers?

A. I think I did.

X Q. 399. In what trade papers?

—. I can't recollect; it was simply a faint recollection on my part that we did.

X Q. 400. Under what name did you put it in your list?

—. If we printed it in our list at all, it must have been under "Royal Hungarian bitter water."

X Q. 401. Did you mention Mattoni's name at all?

A. We may have said "Mattoni's."

X Q. 402. Under what name was it sold in the trade?

A. As "Royal Hungarian bitter water."

X Q. 403. Do you know how it was sold to the public?

A. I cannot tell.

X Q. 404. You didn't sell it to the public directly?

A. No, sir.

X Q. 405. Does all of your business go to the trade; that is, the jobbers and retailers?

A. Yes, sir.

X Q. 406. That has always been the case, has it?

A. Not always.

X Q. 407. I mean so far as these bitter waters are concerned?
581 A. No, not even so far as the bitter waters are concerned. We did retail up to the year 1893 at 6 Barclay street.

X Q. 408. Then you retailed this Royal Hungarian bitter water at 6 Barclay street, did you not?

A. We may have. I have no definite recollection whether we did or not, but it may have been we did, if anybody called for it.

X Q. 409. Did you go to Buda Pesth in 1889, at or about the time when you arranged this first contract with Mattoni?

A. That is my recollection.

X Q. 410. Did Mattoni furnish you with any other papers besides those which you have produced here at that time?

A. I don't recollect if he did.

X Q. 411. Did you visit his springs in 1889?

A. I think I did in that year. I wouldn't be sure about that. I have been there frequently.

X Q. 412. Since?

A. Yes.

X Q. 413. Now, in 1889, do you know how many springs Mattoni, or Mattoni & Wille, had?

A. I don't know exactly how many he had; I know he had several.

X Q. 414. You don't know how many?

A. I do not.

X Q. 435. Do you know their names at that time?

A. I didn't pay any particular attention to them.

X Q. 416. Did Mattoni furnish you with any pamphlets concerning his springs or publications made by him?

A. I think he did.

X Q. 417. Are you acquainted with this circular of Mattoni & Wille which I now show you?

A. I am not.

X Q. 418. You never saw that?

A. I have never seen this.

X Q. 419. Are you acquainted with this circular of Mattoni & Wille which I now show you (showing witness circular)?

A. I have never seen this circular.

X Q. 420. Are you acquainted with this label for Franz Deak which I now show you?

A. It must be a similar label to the one I have produced marked for identification on page 40. I do not know whether I have
582 seen this particular label or not. It appears, upon comparison, to be the same label as the one marked for identification No. 3, with the exception of the printing on top of the label. The label marked for identification has one line on top in heavy black type which reads "Mattoni's Ofner bitterwasser" whereas this label now shown me has two lines on top in smaller print, the first line stating "Mattoni's," and the second line "Ofner Koenigs bitterwasser."

X Q. 421. Are the colors of the two labels the same, a red field in the center and white panels on both sides?

A. Substantially the same.

Complainant's counsel offers in evidence the label last shown to the witness and the same is marked "Complainant's Exhibit Mattoni's Franz Deak Label, Feb. 28, 1898, J. A. S., ex'r."

Mr. Coe: Objected to as immaterial and irrelevant.

X Q. 422. Do you know from what spring or springs the water came which you imported under the name of Mattoni's Royal Hungarian bitter water?

A. I do not know, except in a general way that it is stated on the German label which I produced and which is marked for identification Mattoni's 1889 Label No. 1, that this water is drawn from the Hunyadi Matyas spring.

X Q. 423. Is that all that you know about it?

A. That is all I knew about it at that time.

X Q. 424. Did you know where that spring was situated?

A. At that time, in 1889?

X Q. 425. Yes.

A. I can't recollect whether I knew where that spring was situated at the time that you refer to.

X Q. 426. Did you go to see it?

A. I think I did.

X Q. 427. Have you any recollection of it?

A. It was on the grounds owned by Mattoni.

X Q. 428. How did it look; had it a house over it?

A. Yes.

583 X Q. 429. What sort of a house?

A. A sort of a shed.

430 X Q. Open on all sides?

A. I think it was closed up.

431 X Q. How large was it?

A. I can't tell; I didn't give that particular attention.

432 X Q. Was it situated in the middle of the grounds or at the outskirts?

A. I think it was not very far from his building called the Salt Bath.

433 X Q. Where was that building located?

A. On the same grounds, not very far distant from this spring.

434 X Q. Do you know where the other springs of Mattoni & Wille were located at the time?

A. As far as I know, they were distributed over the grounds. The grounds extend over a considerable space.

435 X Q. Was there any bottling establishment on the grounds?

A. Yes, sir.

436 X Q. Where was that located?

A. I couldn't tell you now exactly; I didn't bother myself with that matter. I was there a short time and I have been there since, and each time there for a short space of time, simply talking with the manager on matters of business, and probably walked over all the grounds around there.

437 X Q. Did you arrange with Mattoni in 1889 that he should export for you to the United States a certain water, or was there nothing arranged about the kind of water which he was to sell you?

A. In 1889 we agreed upon that Royal Hungarian bitter-water label.

438 X Q. I am not speaking about the label now; I am speaking of the water?

A. And that the water was to be of standard strength.

439 X Q. What standard was agreed upon?

A. What it said on the label; the analysis on the label.

440 X Q. Was the water which was shipped to you in 1889 and until the contract of lease was made according to that standard, as far as you know?

584 A. As far as I know. I cannot tell exactly, as I have made no analysis of it. Mattoni & Wille bear such a high reputation that I can justly rely upon them.

Mr. KNAUTH: Never mind that. That is objected to as volunteered and not responsive.

441 X Q. So far as you know, the water which was sent to you until your contract of lease in 1890 was made was according to the analysis which is stated on the bottle which has been offered in evidence as Complainant's Exhibit Royal Hungarian Bitter-water Bottle?

A. As far as I know; I have no proof to the contrary.

442 X Q. You did not find that the water was deficient in strength or in quality?

—. I have had no complaint about that, nor did I find anything of that sort.

443 X Q. Can you produce the silver medal, at Paris in 1878, which is mentioned on the labels of those bottles?

A. I presume they are in the possession of Mr. Mattoni.

444 X Q. I am asking you whether you can produce it?

A. I have not been given notice to produce said medal, and I presume it is in the possession of Mr. Mattoni.

445 X Q. I am only asking you whether you can produce it?

A. I cannot.

446 X Q. Can you produce the medal of merit, Vienna, 1873, which is mentioned in the label?

A. (Same answer.)

447 X Q. Can you produce the silver medal, Sydney, 1879, which is mentioned on that label?

A. (Same answer.)

448 X Q. Did Mr. Mattoni show to you the pamphlet which I now show you, entitled "Chemical Analysis of Mattoni & Wille's Combined Six Ofner Kings Bitter-water Springs," in the German language?

A. I have never seen this pamphlet which is dated Buda Pesth, 1878.

585 449 X Q. Is it your recollection that in 1889, when you made this first contract with Mattoni, you agreed with him that he should furnish you only this one water specified on the labels of the bottles, which were thereafter imported under the 1889 contract?

A. My recollection is that we agreed that he was to ship us the water from the Hunyadi Matyas spring under the labels that I had designed.

X Q. 450. Was the Hunyadi Matyas spring mentioned between you and Mattoni at that time?

A. No, except as to the labels of the Royal Hungarian bitter water, the German labels stated that they were drawn from the Hunyadi Matyas spring.

X Q. 450½. But that was not stated on the English label under which the water was imported?

A. Not at first, but we advertised it.

X Q. 451. Was there any reason why that was not mentioned on the English label?

A. I don't think that there was any particular reason on that point.

X Q. 452. Referring now to Defendant's Exhibit Mineral Water General Advertisement, what was the meaning of the firm or concern which signed your advertisement in that paper styled "Mattoni's Hungarian Bitter Water Co."?

A. That was our company, simply the name used for the introduction of that business, as we were not decided then whether we would carry on that Hungarian bitter-water business under our own name or establish a new company or branch house for that purpose. It was afterwards decided to do it under our own name, and that name was abandoned.

X Q. 453. And that was only a name, and there was no incorporated company?

A. There was no incorporated company, no. There is our address and our post-office box, and nobody else was connected with it. It was a temporary advertisement.

X Q. 454. In the same advertisement I notice the title "Mattoni's Royal Hungarian bitter water, Hunyadi Matyos." How did you come to use that phrase?

A. Because the Royal Hungarian bitter water was drawn from the Hunyadi Matyas spring, and Mattoni used the alternative
586 names of Hunyadi Matyas as well as the Ofner Koenigs bitterwasser, which in English is Royal Hungarian bitter water from the city of Ofner, for this spring, and as we at that time were not decided under which name we would introduce it, we used both alternative names. That first "Matyos" is simply an error of the printer, and should read "Matyas."

X Q. 455. Is this publication of March, 1890, the first publication in which you used the name Hunyadi Matyos or Matyas in the United States?

A. It may have been used before.

X Q. 456. Can you produce any publication prior to it in which it is used?

A. I cannot now, as I have not saved any.

X Q. 457. Did you, between July 1889, and March, 1890, receive any communications from Mattoni with reference to this water, or its analysis or the mode of its sale?

A. I cannot recollect.

X Q. 458. Was there any correspondence between you and Mattoni & Wille between July, 1889, and March, 1890?

A. There may have been, but I cannot recollect now.

X Q. 459. If there was, you have that?

A. I don't know whether we *we* would have that.

Complainant's counsel requests the witness to search for his correspondence with Mattoni & Wille from July, 1889, to July, 1890, and to produce it at the next session.

X *O.* 460. You have stated on direct examination that, in 1889, you made a preliminary contract with Mattoni for the sale of this Hungarian bitter-spring water for the United States, which covered all his springs until you could determine which one you would take hold of. How do you harmonize that statement with the testimony which you have now given that it was arranged between you and Mattoni that he should furnish you the water from the Hunyadi Matyas spring, the analysis of which was on your labels?

587 A. Because that is the strongest spring of all his springs there, and what I meant to say was simply until we could determine finally under what label we would introduce it.

X Q. 461. Then the object of making a preliminary contract before making a final contract, was not to select any certain waters, but to find out what label you could use; wasn't that the fact?

A. No; it was partly that, but it was also probable that we would select some of his other springs. I couldn't tell in 1889 when I was over there. He took me unawares, pressing me to introduce his Hungarian bitter waters or to sell them in the United States. At that time I made a contract with him for the Hiesshuebl springs, and not wanting to refuse him I made this contract until I could determine when I got home, and made full investigation about these matters what we would do. It was simply that I had not paid any attention to these Hungarian bitter waters matters at the time we made that preliminary contract.

X Q. 462. Still, you have not explained how it required a separate contract to get control of the same water thereafter which was secured to you by first contract, which was agreed upon between you and Mattoni as already stated by you?

A. We wanted to get it under different conditions. We wanted own the spring, so to speak; we wanted to control it entirely or otherwise we couldn't expend any money on it.

X Q. 463. Why couldn't you expend any money on it, having a contract for twenty years with an option for twenty years thereafter, as secured to you under the agreement of 1889?

A. I am not familiar now, not having looked over the contract of

1889 for some years, what the conditions of the one are in comparison with the conditions of the other.

X Q. 464. Then you are not able to say what the two reasons were which induced you to make the second contract after having entered into the first contract of 1889?

A. I did not state so, Mr. Knauth. The true reason was simply that we wanted to control the label for the American market
588 entirely so that we could not be interfered with by any of the European purchasers in this market.

X Q. 465. What had the label to do with this business?

A. Because under the second contract we have absolute control over that label without permitting any interference by Mattoni & Wille, and he could not use that label for any of his customers no matter in what country they may be situated; it is our property.

X Q. 466. But as Mattoni & Wille had already contracted by the first contract not to furnish any one else in the United States either directly or indirectly the water of their springs how was any interference on their part to be feared?

A. Very easily, we have had that experience before. We made the contract of 1890 with other waters that we control, and unless we had a distinctive label of our own, Mattoni may have kept good faith, but still he may have sold to Germany and the German commission man or merchant shipped over to the United States and interfered materially with our trade.

X Q. 467. When you came back to the United States you determined to thereafter acquire a lease of the Hunyadi Matyas spring and to devise a blue and red label for the water of the Hunyadi Matyas spring for your use in the United States; was not that the fact?

A. Yes, sir.

X Q. 468. And you determined to put upon that label the name Hunyadi Matyas instead of Royal Hungarian bitter water, did you not?

A. The same name as he used abroad.

X Q. 469. I am asking the name Hunyadi Matyas?

A. We determined to put the name Hunyadi Matyas on the label as the water was drawn from the Hunyadi Matyas spring No. 2.

X Q. 470. Now what is that spring, Hunyadi Matyas No. 2?

A. That is the spring from which the water is drawn.

X Q. 471. When was that spring dug?

A. I can't tell exactly; I don't know.

X Q. 472. You never inquired?

589 A. I never inquired when it was dug and only was told that it was registered as a trade-mark in 1877.

X Q. 473. Don't you know that you are mistaken as to that and that no spring called Hunyadi Matyas No. 2 was registered in 1877?

A. I do not know in reference to the No. 2, but I know that the Hunyadi Matyas spring had been in existence because it had been registered as a trade-mark in 1877 and the litigation with Andreas Sexlehner was decided in 1873.

X Q. 474. If that was true as to a Hunyadi Matyas spring, did it not indicate to you that the Hunyadi Matyas No. 2 spring was a different spring?

A. I took Mr. Mattoni's word for that.

X Q. 475. That it was a different spring?

A. No, that this spring was the Hunyadi Matyas spring No. 2 from which our water was to be drawn.

X Q. 476. I am asking whether if you draw water from a spring called Hunyadi Matyas No. 2, that is not an indication to you that that is not the same spring as a spring called Hunyadi Matyas?

A. Not necessarily with the Hungarian bitter-water springs.

X Q. 477. Why not?

A. They are different from most springs. The water does not spout up or run out and it gathers in the well.

X Q. 478. What object would there be in calling a spring Hunyadi Matyas No. 2, if it was not another spring than Hunyadi Matyas No. 1?

A. Just as I have stated, there may be two springs of the same nature and the water is allowed to be drawn together so as to make a uniform water.

X Q. 479. Do you mean to say as a matter of fact that the water from the spring Hunyadi Matyas No. 2 was the same as the water drawn from the spring called Hunyadi Matyas or No. 1?

A. I don't wish to say anything about it.

X Q. 480. You don't know?

A. I don't know.

X Q. 481. You never inquired about it?

A. I only was told that the water that we are getting is drawn from spring No. 2, being the strongest, and as I learned
590 from the testimony given by Mr. Saxlehner they have various springs and run it into one vessel so as to get a uniform water, and it may be the same case there.

X Q. 482. But you don't know?

A. I don't know.

X Q. 483. And all that you have stated as to that is simply volunteered?

A. Simply I give it for what it is worth.

X Q. 484. Coming from your fancy?

A. No, coming from Mr. Saxlehner's testimony.

X Q. 485. I mean so far as Hunyadi Matyas springs are concerned?

A. Only what I was informed by the proper parties there, that our water is drawn from the spring No. 2.

X Q. 486. You were not informed that your water was drawn from a combination of Hunyadi Matyas and Hunyadi Matyas No. 2?

A. I was not informed as to that.

X Q. 487. Did you ever inquire what the character, composition or analysis of the water known as Hunyadi Matyas spring owned by Mattoni & Wille was?

A. I had no reason to inquire.

X Q. 488. You did not?

A. I did not.

X Q. 489. I am not asking you as to reasons and I wish you would confine your answers to that which is asked about. I have here analysis of Mattoni & Wille's publication of 1878 showing the composition of their Hunyadi Matyas spring; please compare that analysis with the analysis of the Hunyadi Matyas water imported by you and state whether it is the same or not?

—. The analysis in this pamphlet purporting to be dated Buda Pesth, 1878, shows a much weaker water.

X Q. 490. Does it show different proportions of sulphate of magnesia and sulphate of soda?

A. Yes, sir.

X Q. 491. And different proportions of the other ingredients?

A. And different proportions of the other ingredients.

X Q. 492. Do you mean that you never inquired while in Buda Pesth or thereafter when the Hunyadi Matyas spring No. 2
591 had been opened, or whether any trade-mark or name had been deposited or registered for it as distinguished from the original Hunyadi Matyas spring?

A. All these springs are under the——

X Q. 493. Answer the question, please; the question admits of an answer yes or no (492 X Q. repeated).

A. I did not inquire.

X Q. 494. Was it not plain to you that when Mr. Mattoni handed you a certificate of registration of a trade-mark for a Hunyadi Matyas spring that could not be the same as a Hunyadi Matyas spring No. 2?

A. I did not give that any thought; I presume he could have ten or twenty springs by the name of Hunyadi Matyas and would simply number them for his help to distinguish where they should draw the water from.

X Q. 495. Did you ever see any Hunyadi Matyas spring at Mattoni & Wille's grounds besides the Hunyadi Matyas spring No. 2 for which you obtained a lease?

A. I simply recollect being shown the Hunyadi Matyas spring and told "our water is drawn from that spring."

X Q. 496. So you saw only one?

A. I saw others, but there was no reference made thereto.

X Q. 497. I mean you were shown only one Hunyadi Matyas spring?

A. No, I was shown others.

X Q. 498. Do you mean Hunyadi Matyas springs?

A. I don't know whether the name Hunyadi Matyas was stated or not.

X Q. 499. That is what I want to know; I want to know whether you were shown more than one Hunyadi Matyas spring on Mattoni & Wille's grounds?

A. I know the last time I was there I was shown another one and it was stated to me that it was a weaker spring from which the No. 3 that we imported a short time was drawn.

X Q. 500. When was that?

A. That was I believe two years ago, two or three years ago.

X Q. 501. Did you at that time obtain a contract with reference to this spring Hunyadi Matyas No. 3?

A. No contract at all was entered into about it.

592 X Q. 502. What arrangement was made?

A. None whatever, except that if we wished any of a weaker spring then we could have drawn from that spring.

X Q. 503. Then you mean to say that you in fact saw the original spring called Hunyadi Matyas as distinguished from Hunyadi Matyas No. 2; is that so?

A. I have not presumed that there was any original or non-original; I have not paid any attention except just what I have stated.

X Q. 504. You mean you do not recollect ever having seen any spring which had the name Hunyadi Matyas as distinguished from Hunyadi Matyas No. 2?

A. I may have; I have no recollection on that point; I have seen so many springs there I don't know which.

Adjourned to Thursday, March 1, 1898, at 10.30 a. m.

SAXLEHNER
v.
EISNER & MENDELSON CO.

NEW YORK, *March* 1, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

It is stipulated by counsel for the complainant and counsel for the defendant that, in order to avoid the necessity of proving by depositions to be taken in Hungary under a commission the facts set forth therein, certified or notarial copies of certificates or documents issued by or in the possession of Hungarian courts, or State or municipal officers in Hungary, duly authenticated in the usual form, may be offered in evidence by either party with the same force and effect as if the facts therein certified to were testified to by competent witnesses. This stipulation shall not impair the right

593 of either party to object to such evidence as immaterial and irrelevant, but shall preclude the objection that it is incompetent because not proved in sufficient manner.

Complainant's counsel produces a duly authenticated copy and translation of the decision of the Hungarian minister of agriculture, industry and commerce in the matter of the petition of Ignatius Markus, and it is agreed between counsel that the same may be offered in evidence by defendant as being an authenticated copy of Defendant's Exhibit 1873 Hungarian Decision.

Complainant's counsel admits that, on the 6th day of July, 1877, Mattoni and Wille registered in the register of trade-marks four certain trade-marks for bitter-water springs called, respectively, Szechenyi, Deak, Sz. Istvan and Hunyady Matyas, Buda-Pesth, and

numbered respectively Nos. 194, 195, 196 and 197 in the trade-mark offices of the Buda-Pesth chamber of commerce and industry.

Continuation of the cross-examination of MORITZ EISNER.

By Mr. KNAUTH:

X Q. 505. Have you searched for the correspondence with Mattoni and Wille, which I requested you to produce yesterday?

A. I have not been able to yet; it was late yesterday afternoon, and I had to attend to my mail this morning; but I will as soon *as soon* as I possibly can.

X Q. 506. In addition to that, I also request you to search for such correspondence as you had with Mattoni and Wille during the year 1890 and until 1893.

A. I will do so.

X Q. 507. Have you looked up the quantities of Royal Hungarian bitter water which you sold during 1889 and 1890?

594 A. I have not been able to look that up, and I don't know whether I have the books yet, but I shall search for them.

X Q. 508. In addition to that I also request you to produce at the next session the books from which the yearly sales of Hunyadi Matyas water by your firm will appear from the year 1890 until the present time; will you produce those books or furnish extracts?

A. I will furnish extracts.

X Q. 509. Did you receive from Mattoni any other Hungarian decisions in 1889 or in 1890 than the one produced by you dating from the year 1873?

A. I do not think that I did.

X Q. 510. You have stated that Ignatius Markus was the owner of a spring which he called Hunyadi Matyas. How do you know that he was the owner and not the lessee of the spring?

A. I was informed so, I believe, or at least I took it from the decision; I don't know exactly how I came to that knowledge. By the decision, I refer to the 1873 decision.

X Q. 511. That decision speaks of a bitter-water well discovered by Ignatius Markus and called by him Hunyadi Matyas. Was that all the information which you had on the point of his being the owner of the premises?

A. That may have been all or there may have been some other information; I can't recollect now. I took it for granted that he had named the spring Hunyadi Matyas and owned it.

X Q. 512. Do you mean to testify as a fact that a water called Hunyadi Bela was on the market in the United States previous to the time when you entered into the contract of lease in 1890?

A. I testify, to the best of my recollection, that I believe it was. I am not quite positive on that point.

X Q. 513. I notice that the Defendant's Exhibit 1873 Hungarian Decision does not speak of the registration of any trade-mark, but of a notification given by Ignatius Markus to some authority in Hungary that he intended to call a spring by a certain name.

595 You have stated in your direct examination that Andreas Saxlehner had applied for the cancellation of the trade-mark

Hunyadi Matyas and was defeated. Did you mean to refer to Defendant's Exhibit 1873 Hungarian Decision by this testimony?

A. I referred to it as a layman simply without knowledge of the legal matters contained therein. The way I looked upon it there was some controversy about the trade name Hunyadi Matyas between the two parties and there was that decision rendered in which Saxlehner was defeated.

X Q. 514. When you received Defendant's Exhibit Hunyadi Janos Trade-mark from Mattoni, was there the slip pasted on it containing some German words which I find attached to the first page of the exhibit?

A. I believe there was.

X Q. 515. Do you understand German?

A. Yes, sir.

X Q. 516. Will you please translate what is stated on that slip?

A. "Certificate that Saxlehner's Hunyadi Janos trade-mark of Mr. Andreas Saxlehner first registered December 12, 1873, then transferred to the widow of Saxlehner on the 23d of June, 1889, was newly registered by the widow of Saxlehner on the 14th of July, 1890."

R. D. Q. 517. When you received this trade-mark certificate was there attached to it the white and red Hunyadi Janos label which is found attached to Defendant's Exhibit Hunyadi Janos Trade-mark?

A. There was.

X Q. 518. Have you ever seen any trade-mark or label used by Ignatius Markus for any bitter water?

A. No, sir.

X Q. 519. Had you ever any knowledge of a white and red label for bitter waters substantially like Saxlehner's red and white label attached to the certificate which you have produced which was used previous to 1873 by any one else?

A. I paid no attention as I stated to the mineral-water trade up to 1878, and then only a passing attention and no particular attention up to the year 1886.

596 X Q. 520. You state in your answer to the bill of complaint in this case that the shape of the bottles in which your Hunyadi Matyas bitter water was sold was common to the trade when you first sold this water; is that true or not?

A. That is true.

X Q. 521. What do you mean by saying that it was common to the trade?

A. Nearly all the Hungarian bitter waters came in the same shape and style of bottle.

R. D. Q. 522. You also state that it was known to you that since 1873 continuously down to the year 1889 Hunyadi Matyas water had been continuously put up for sale and sold in Hungary in bottles of the same shape as the Hunyadi Janos bottle; how did you know that this was a fact?

A. The bottles I saw in 1878 were of the same shape and style

and general appearance to the best of my recollection and I took that as an indication that it was sold that way previous to that.

X Q. 523. You also say in your answer to the bill of complaint that the capsule used on your Hunyadi Matyas water had been well known and employed by the trade and was incapable of exclusive appropriation by any one in 1889; is that true or not?

A. That is true.

X Q. 524. You also state that in the year 1890, when you adopted the red and blue label for the Hunyadi Matyas water, the coloring, mode of printing and general style of that label were commonly known and used and not the subject of any proprietary right in Andreas Saxlehner; was that true?

A. That was true; the label when adopted we made more of a brown and blue than red and blue.

X Q. 525. You mean more brown than Saxlehner's red center field?

A. Yes, sir; the pamphlets we had printed here for distribution, the printer got a sort of a red on, but the label itself is more of a brown.

X Q. 526. Does not the color of the label change when the same is exposed to the sun?

A. When it is new it is still more brown, distinctly brown.

597 X Q. 526. And when it is older more red?

A. Well, it gets fainter.

X Q. 528. I suppose the bottles will show best?

A. Yes, sir; I don't know how that bottle in evidence is.

X Q. 529. Did you in the year 1892 bring a suit in the circuit court of the United States for the northern district of Illinois against the International Medicinal Mineral Water Company?

A. We did.

X Q. 530. Did you obtain an injunction against the defendant in that suit?

A. I think we did.

X Q. 531. Did you advertise the fact afterwards that you obtained such an injunction?

A. I don't know whether we advertised this particular one, but we obtained another injunction against the party who bought up Matyas bottles and filled them with artificial water and sold it as genuine Hunyadi water.

X Q. 532. I am not speaking of any other suit, but I will confine myself to this suit. Do you remember the month of the year 1892 when you brought this suit against the International Medicinal Mineral Water Company?

A. I do not.

X Q. 533. Will you refresh your recollection by looking at this certified copy of the bill (showing witness bill)?

A. The 12th day of August, 1892, as appears from this document.

X Q. 534. In this bill you say that your company, the Eisner & Mendelson Company, was "the sole lessee of a certain spring at Buda Pesth known as the Hunyadi Matyas spring," said spring having long been known to the medical world as producing a bitter

water having certain medicinal properties. Did you not know at the time when this bill was filed that there was more than one Hunyadi Matyas spring in Hungary?

A. They are all classified as Hunyadi Matyas springs. If a man owns a lot of ground several acres, he can open wells right along; it is all the same water.

598 Mr. KNAUTH: The answer is objected to as irresponsive. I want to have an answer to the question at the time that there was more than one Hunyadi Matyas spring in Hungary.

A. Besides the one owned by Mattoni?

X Q. 535. I meant by Mattoni.

A. I only referred to the Hungarian bitter-water springs owned by Mattoni & Wille at Buda Pesth.

X Q. 536. You obtained a lease in 1890 for one of the Hunyadi Matyas springs of Mattoni & Wille?

A. Yes.

X Q. 537. Or do you claim that you obtained a lease for more than one spring of Mattoni & Wille which you called Hunyadi Matyas?

A. Well, the way I considered our lease is that we are the only ones that can draw water from the Hunyadi Matyas springs.

X Q. 538. Springs?

A. Yes.

X Q. 539. Now please look at the lease and state where you find that.

A. (After referring to lease.) I find the fact that we had another spring opened afterwards and called it Matyas No. 3.

X Q. 540. Look at the contract.

A. The contract refers to spring No. 2, which was selected by us as containing the strongest water.

X Q. 541. Now it refers only to that one spring and to no other spring, does it not?

A. Literally, yes.

X Q. 542. And for that one spring, Hunyadi Matyas No. 2, you obtained this lease which has been offered in evidence by you?

A. Yes.

X Q. 543. And there is nothing in that lease which would prevent Mattoni & Wille from selling the water of the Hunyadi Matyas spring No. 1 or the water from any other spring which they thereafter might call Hunyadi Matyas either in Europe or in the United States of America; isn't that so?

A. Well, I would have to go over that carefully.

X Q. 544. Look it over.

A. My understanding of the agreement with Mattoni in conversations with him is to the effect that he was not to sell or
599 export any Hunyadi Matyas spring, that we had entire control of that name for the United States.

X Q. 545. But that was not provided for in the contract?

A. It may not have been provided for in those words in the con-

tract, but I rely upon his moral obligation as well as his legal obligation wholly.

X Q. 546. Now further in this bill of complaint against the International Medicinal Mineral Water Company you state that your company had selected and used a bottle of peculiar size and color. What did you mean by that?

A. I didn't state that.

X Q. 547. I mean your company stated it.

—. It may be drawn up by the attorney; it may be legal phraseology which our agent in Chicago signed.

X Q. 548. And you obtained the benefit of these statements under an injunction, did you not?

A. Well, it was a common fraud; it was on the general ground of common fraud.

X Q. 549. Answer the question, please.

A. I don't know; I haven't seen that bill of complaint for seven years.

X Q. 550. Look at it again and state what it means.

A. That is regular legal phraseology in cases of that sort, I presume.

X Q. 551. You mean it was not true?

A. I don't say that it was not true.

X Q. 552. Have you not testified just now that the style and color of the bottle was old and used by others commonly?

A. Yes, sir.

X Q. 553. So that this statement in the bill of complaint was not true?

A. Well, not in that sense. It was selected by us; the same style and that same color and that same cap as we are using today, or substantially the same, were sold by us. The substantial difference from the others was that ours was a brownish red whereas the other had a deep red center field.

X Q. 554. But you don't speak of a brownish red in this complaint.

A. I think it does.

600 X Q. 555. Where is it?

A. (Reading from complaint:) "Being of a reddish-brown tint."

X Q. 556. You mean to say that Saxlehner's labels then in use were not of a reddish-brown tint?

A. They were red, distictly red, the center field, whereas ours was more bordering on a brown than on a red.

X Q. 557. You further say that at that time your company devised and adopted a cover or capsule of tinfoil to close the head of the bottle; was not that the same capsule which was used by others and had been used for a long time?

A. Certainly.

X Q. 558. And you adopted it again for the purposes of this suit against the International Medicinal Company?

Mr. Coe: Objected to as an unfair statement.

A. We had adopted it in its details probably, but the general style was common.

X Q. 559. But you did not claim that the details were copied by the defendant in that case, only the general style?

A. I don't know whether anything was copied; it was simply common fraud. I don't think I saw a bottle of it. Our agent entered suit in Chicago simply to stop a common fraud.

Mr. KNAUTH: The answer is objected to as irresponsive.

X Q. 560. In this complaint you say further that this bottle, capsule and label adopted by your company soon after their introduction, about the year 1887, came to be known in the markets of the United States as indicating the product *the product* of the Hunyadi Matyas spring of Buda Pesth, Hungary. Was not the year 1887 a mistake in this connection?

A. It must have been; as I stated, I did not read that complaint and did not sign it, and it might have been an error of the typewriter and might have been an error of our agent.

X Q. 561. It is also stated in this complaint that your company holds and enjoys an exclusive right to use the bottles and capsule in connection with the water. Was that true?

601

A. Certainly so.

X Q. 562. You meant that the style of bottle was your exclusive property at the time?

A. For Hunyadi Matyas, while they may have been common with many others.

X Q. 563. Did it not strike you that your blue and reddish-brown label was strikingly similar to the blue and red label that Andreas Saxlehner used for the Hunyadi Janos water?

A. On the contrary I thought that the Arpad and the Janos were very similar in color and appearance, even in the center field and picture, but that the Hunyadi Matyas was distinctly different. It had a black stripe giving the word Hunyadi Matyas underneath, which did not appear on any of the other Hunyadis.

X Q. 564. Did it appear to you improper on the part of the sellers of the Hunyadi Arpad water to use a label so similar to that of Andreas Saxlehner?

A. I thought after an investigation that they had a perfect right, as they had been sued, an injunction obtained and the injunction had been dissolved.

X Q. 565. And in your opinion that justified the sellers of the Hunyadi Arpad water is continuing the sale of a red and blue label similar to that of Saxlehner in the manner described by you?

A. As far as I could understand it did, otherwise the Hunyadi Janos people would not have let up on them.

X Q. 566. What was the condition of the Hungarian laws at that time, did you know?

A. I know that all the Hunyadis were selling alongside of each other in Austria, in Hungary, in Germany and in other countries.

X Q. 567. At what time?

A. The time you refer to, in 1892.

X Q. 568. Did you not know that there was a litigation pending between Saxlehner and the other sellers of Hunyadi waters in 1892, in Hungary?

A. I did not.

602 X Q. 569. When did you first hear of that litigation?

A. In 1895 or 1896.

X Q. 570. Do you not know that in 1894, Saxlehner obtained a number of decrees against such sellers of Hunyadi waters in Hungary?

A. I don't know that he obtained decrees against any of the Hunyadi waters in Hungary. He did not obtain any against the Hunyadi Matyas to my knowledge, otherwise I would have heard.

X Q. 571. Did he not obtain a decree against Mattoni & Wille in 1894?

A. I don't know whether that litigation was in 1894 or 1895; I cannot tell distinctly.

X Q. 572. Did you not hear that Saxlehner started a suit in 1891 against a large number of spring-owners in Hungary employing similar names and labels, and amongst them Mattoni & Wille?

A. Not to my knowledge in 1891.

X Q. 573. Were you not in constant correspondence with Mattoni & Wille at that time?

A. We didn't have much correspondence about it. Our letters to Mattoni & Wille are very brief; they are simply orders and the receipt of invoices.

X Q. 574. You mean that a suit of the firm of Andreas Saxlehner against Mattoni & Wille to restrain Mattoni & Wille from the use of similar labels would not have interested you at the time?

A. I would not have believed it possible after all the history that preceded it; in fact, I was surprised that the minister of Hungary all of a sudden struck the trade-mark off the register.

X Q. 575. You mean you relied upon the registration of the trade-mark in Hungary?

A. I relied on what history had preceded the spring. A decision had been rendered where it distinctly stated that both the names Hunyadi Janos and Hunyadi Matyas were good trade names and on sale alongside of each other.

X Q. 576. And how about the similarity of the labels?

A. They were selling from that time on, as far — I recol-

603 lect the springs, from 1878 on in similar labels—that is in similar colors—alongside of each other, and I could not have believed it that all of a sudden that should have been stopped until I heard of this decision in Hungary in 1895 or 1896.

X Q. 577. You have referred in your answer to the bill of complaint in this suit here to a litigation which Andreas Saxlehner started about the year 1878 against another water employing the Hunyadi name in Hungary.

A. If it is contained in the answer, I stated it on information and belief probably.

X Q. 578. What is your present recollection on the subject?

A. I have no recollection of the matter except what may have been stated by the Apollinaris Company,

Complainant's counsel offers in evidence a certified copy of the bill of complaint in the suit of the Eisner & Mendelson Company against the International Medicinal Mineral Water Company, verified August 12, 1892, and the same is marked "Complainant's Exhibit Bill against International Company, March 1, 1898, J. A. S., ex'r."

X Q. 579. Now coming back to the contract lease of 1890, state what induced you to change the color of your red and white label and to adopt for it a red and blue label, or as you have called it, a blue label with a reddish-brown center field for the same water?

A. For the simple reason that all the mineral waters of Mattoni were selling abroad under a red and white label, and we would be exposed to competition from abroad all the time.

X Q. 580. Why did you not select a green and orange as the colors?

A. Because the Hungarian bitter waters selling on the market here, all or nearly all were on a blue and red. and it was an adopted style of the trade to look upon that color as Hungarian bitter waters of various kinds, and to make it distinct from the rest we made ours a brown—a distinct brown.

604 581 X Q. You mean as distinct as it appears from the bottles which you have offered in evidence?

A. Yes, from the bottles, and printed on blue paper.

582 X Q. If you had adopted different colors it would have been a hindrance to the sale, would it not?

A. Not at all.

583 X Q. So that there was no object?

A. Not at all; it was the general custom of the trade to look upon the Hungarian bitter waters in blue and red labels.

584 X Q. I am still asking you whether it would not be a hindrance to the sale of this water to change the color of this label?

A. In a commercial sense, when the trade has adopted or looks or general styles upon a certain class of goods, it is always more or fess of a hindrance to change that style. Lithia waters that are not charged in this country from all lithia springs come in half-gallon bottles of a general style and a general appearance; the trade at once looks for lithia waters that are not charged with carbonic acid gas in that style.

585 X Q. Do you not know that Andreas Saxlehner or his consignees, the Apollinaris Company, in this country, had adopted a strikingly different set of colors, namely blue and red, for the Hunyadi Janos water in 1876, and that it had been on sale in this market in very large quantities until 1887 or thereabouts as the only Hungarian bitter water of the blue and red color?

A. I have known the Hunyadi Janos water in this market in red and white colors.

586 X Q. Answer the question; that is not the question.

A. I didn't pay any attention to the mineral-water trade before 1886, so I can't answer that question.

587 X Q. You don't know?

A. No.

588 X Q. When did you first adopt the red oblique print on the blue wings of your Hunyadi Matyas bottle as appears on Complainant's Exhibit B?

A. From the time the McKinley bill went into effect.

605 589 X Q. Did you not know that long prior to that time the firm of Andreas Saxlehner had adopted such red oblique print on the two wings of their labels?

A. I did not.

590 X Q. It was merely accident that you happened to strike that?

A. It must have been pure accident as the law requires it.

591 X Q. Does the law require a red print obliquely on the panels of the label?

A. It is immaterial whether it is red, blue or what, but there was absolutely no design in them.

592 X Q. You don't mean to say that the law requires any oblique print on the wings of a label, do you?

A. Do you mean across?

593 X Q. Yes, diagonally.

A. No, as long as it is stated plainly from what country the goods are imported.

594 X Q. So that it was accidental, just as much as it was accidental in all of the other sellers of Hunyadi water in this country to adopt such diagonal print on the panels?

A. I don't know about any of the others; I positively know that there was no design on our part. I don't recollect whether the Hunyadi Janos had it at that time in that way.

595 X Q. Can you state whose picture is on the medallion in your center panel of the label?

A. As far as I can recollect it is the King St. Stephen. It represents a former King of Hungary.

596 X Q. What was the necessity of having two kings on your label, King Stephen and King Hunyadi Matyas?

A. I can't tell whether there was any necessity for that; it was simply so selected. It may have been the portrait of King Matyas for all I know.

597 X Q. You don't know?

A. I don't know.

598 X Q. You have stated that at the time when you made the lease in 1890, the agents of Andreas Saxlehner advertised largely in the city of New York and all over the United States that there were various Hunyadis on the market. To what agents do

606 you refer?

A. The Apollinaris Company, Limited, and their representatives here.

599 X Q. What knowledge have you that the Apollinaris Company, Limited, was the agent of Andreas Saxlehner?

A. It was public property.

600 X Q. What do you mean by "public property"?

A. I have in my possession a pamphlet that was sent out to that effect by Andreas Saxlehner.

601 X Q. You mean appointing the Apollinaris Company agent?

A. Yes.

602 X Q. Where is that pamphlet?

A. In my office.

Mr. KNAUTH: I want you to produce it.

603 X Q. Do you know of the contract between Saxlehner and the Apollinaris Company which has been offered in evidence here?

A. No, sir; I never read it.

604 X Q. What do you mean by you never read it?

A. The contract between the Apollinaris Company and Saxlehner.

605 X Q. Did you cause this publication to be made which I now show you dated August, 1897?

A. I suppose it was inserted by our company.

606 X Q. Do you recollect it as well as the other publication which you produced?

A. I do not recollect it.

607 X Q. How is it that this publication which is of so much more recent a date than those which you have produced is not fastened in your mind as well as the old publications produced by you?

A. I can only account for it that Mr. Mendelson may have given that or somebody else in our office.

608 X Q. Have you any doubt that it emanated from your company?

A. I have no reason to doubt it, but I do not know anything about it.

X Q. 609. Were you a subscriber to the Boston Drug Market?

A. No, sir.

X Q. 610. Is that one of the papers in which you ordinarily advertise or frequently advertise?

A. No, sir.

607 X Q. 611. But you have advertised in the paper?

A. We may have before. It is issued by one of our customers, West & Jenney, of Boston, and I suppose that would account for it, who are sellers of the Hunyadi Matyas water.

Complainant's counsel offers in evidence the advertisement referred to and the same is marked "Complainant's Exhibit Boston Drug Market Advertisement, March 1, 1898, J. A. S., ex'r."

X Q. 612. Have you the testimonials of leading medical authorities which are reproduced in this advertisement in your possession?

A. No, sir.

X Q. 613. What material had you to publish these testimonials as applying to your Hunyadi Matyas water?

A. We must have received a pamphlet with these testimonials from abroad. I notice in the pamphlet one testimonial which was

attached to the trade-mark certificate, Defendant's Exhibit Hunyadi Matyas 1877 Trade-mark.

X Q. 614. Of what year was that?

A. It does not state the year here.

X Q. 615. How were you then enabled to put in a date to the testimonial which you reprinted in this advertisement?

A. I stated I must have had some other printed matter from which they were taken. I only see that the same one is contained in here also in the 1877 trade-mark.

X Q. 616. Are you not mistaken as to that, and does not — testimonial which you read from Defendant's Exhibit Hunyadi Matyas 1877 Trade-mark certify over the name of Dr. Rokitansky to the excellent qualities of "Mattoni's Ofner bitterwasser" instead of "Hunyadi Matyas bitter water" as stated in your published advertisement?

A. Not at all; Mattoni's Ofner bitter water is distinctly stated on the label of Hunyadi Matyas water as it is printed in the German language, showing that the words "Mattoni's Ofner bitterwasser" are an alternative name for Hunyadi Matyas water.

608 X Q. 617. I was asking you whether the testimonial which you have quoted referred to the same name or not; I want you to state by comparison with the testimonial and not by comparison with something else which you say is like it?

A. Not the same paper from which I read this.

X Q. 618. Read the testimonial and nothing else.

A. From which I read the testimonial; the alternative names are stated on the label on the back of it.

X Q. 619. Now please confine yourself to the testimony and do not refer to anything else which you find on this price-list or advertising issue from Mattoni & Wille from which you are reading?

A. (Reading:) "Mattoni's Ofner bitterwasser."

X Q. 620. Therefore, so far as the words of the certificate go signed by Dr. Rokitansky, the certificate refers to Mattoni's bitter water and not in words to Hunyadi Matyas?

Q. On the sheet it states as a heading "Mattoni's Ofner bitterwasser" but I do know that it refers to the Hunyadi Matyas spring as it is stated on the same sheet.

X Q. 621. Do you mean to say that it refers to the Hunyadi Matyas spring No. 2 from which you sold the waters?

A. The Hunyadi Matyas spring in general.

X Q. 622. What spring?

A. I don't know whether one, two or three.

X Q. 623. You find only one spring referred to in the advertisement, do you?

A. There is no distinction made as to the number of springs.

X Q. 624. Do you mean to say that there is more than one spring referred to in the advertisement?

A. The advertisement will speak for itself.

X Q. 625. Well, look at it and find a reference to more than one Hunyadi Matyas spring?

A. This says simply "Hunyadi Matyas spring."

X Q. 626. In the singular?

A. Yes, sir.

X Q. 627. Can you produce the testimonial of Dr. Francis Brunner of May 13, 1862, which is printed in your advertisement Com-
609 plainant's Exhibit Boston Drug Market Advertisement?

A. It may have been a misprint.

X Q. 638. Do you think it was a misprint?

A. I do not know.

X Q. 639. What have you to produce upon which this advertisement was made?

A. Simply my statement that we received the pamphlets containing these testimonials from abroad.

X Q. 630. Will you please produce these pamphlets at the next session?

A. I have looked for them to show the original pamphlet from which we reprinted the testimonials in our advertising pamphlet which I produced in evidence, but I have not been able to find the original although I know that we did receive it.

X Q. 631. Will you search for it once more and produce it at the next session, if you can?

A. I will.

X Q. 632. Will you do the same as to the testimonials of Joseph Riedl of July 15, 1872, and Charles Tormay of August 1, 1862, which are printed in your Boston Drug Market advertisement, and also that of F. Lorinser of April 1, 1865?

A. These testimonials are taken from the pamphlet which we published marked Defendant's Exhibit Hunyadi Matyas Label Circular, and this pamphlet was a reprint of a similar pamphlet which we received from abroad from Mattoni & Wille. The date of Dr. Tormay's testimonial in 1862 I see also printed in this pamphlet; it may have been correct and it may have been a misprint; I don't recollect now; at any rate, I distinctly know that it is a reprint from the one that we received from abroad.

X Q. 633. Do you mean that it is a reprint or a transiation?

A. A translation.

X Q. 634. What you received from abroad was a pamphlet in German, was it not?

A. I can't recollect now whether it was in German or in various languages, but I know that we received pamphlets from abroad at the time we entered into this lease, and we reprinted them in the English language.

610 X Q. 635. Did it not strike you as peculiar that from the decree of 1873, which had been furnished to you, it appeared that Ignatius Markus had in 1872 discovered a spring which he called Hunyadi Matyas, or for the calling of which he applied for permission to use the name Hunyadi Matyas, and that you published in connection with the sale of the waters of the spring of that name so-called testimonials dating from the years 1862 and other years prior to 1873?

A. Not at all. From the controversy as it appears in the 1873

decision I took it for granted that said spring was in existence before.

X Q. 636. Under the name Hunyadi Matyas?

A. That I have no knowledge of.

X Q. 637. Then how could a certificate or testimonial employing the name Hunyadi Matyas be made prior to that decision?

A. Because the water was drawn from that very spring.

X Q. 638. Then you mean the testimonial was changed so as to put the name Hunyadi Matyas into it?

A. I cannot tell about that; I have no recollection about that.

X Q. 639. You don't know anything about it?

A. No.

X Q. 640. You don't know anything about the truth or falsity of these testimonials, do you?

A. No more than I relied upon what I received.

X Q. 641. You have never seen the original testimonials?

A. No, sir.

X Q. 642. You have never taken the trouble to look up the original testimonials?

A. I didn't find it necessary.

X Q. 643. Well, you have not?

A. No.

X Q. 644. Did you cause this publication to be made in the Druggists' Circular and Chemical Gazette which I now show you (showing witness paper)?

A. Yes, sir.

Complainant's counsel offers in evidence the publication referred to, and the same is marked "Complainant's Exhibit Defendant's Druggists' Circular Publication, March 1, 1898, J. A. S., ex'r."

611 X Q. 645. Can you produce the original testimonials which are reprinted in this publication of July, 1896?

A. I may probably be able to if I write for them.

X Q. 646. You mean you haven't got them?

A. I haven't got them.

X Q. 647. Do you know where they are?

A. I suppose in the possession of the owner of the springs.

X Q. 648. No, I am asking if you know where they are?

A. I do not. They are the same testimonials referred to before, I think.

X Q. 649. I show you a publication in the Druggists' Circular and Chemical Gazette of January, 1897, on page 36 thereof; did you cause this publication to be made?

A. Yes, sir.

X Q. 650. What do you know of the repeal of the Hungarian trade-mark law of 1872 in the year 1895?

A. I understood that the former existing trade-mark law of 1872 was superseded by a new trade-mark law and the old one was repealed thereby.

X Q. 651. How did you understand that?

A. I may have been told so; I may have learned it from the

circulars of Saxlehner. I don't know how I came to that understanding.

X Q. 652. You don't know?

A. No.

Complainant's counsel offers the publication referred to in evidence and the same is marked "Complainant's Exhibit Defendant's Advertisement Druggists' Circular, January, 1897, March 1, 1898, J. A. S., ex'r."

X Q. 653. Have you ever seen the Hunyadi Matyas No. 3 spring?

—. I may have or may have not; I can't recollect distinctly now that I did. I only know that we wished to have the water drawn from another spring. We were informed by Mattoni that he would first have to apply for permission and have an analysis made.

X Q. 654. Why did you wish to have the water drawn from another spring?

A. We wanted to have a competitive water against the
612 Hunyadi Lajos, the Hunyadi Vilmos and the Hunyadi Alajos, which were weaker waters and were selling at a lower price. We abandoned the idea after the first or second importation.

X Q. 655. Was the Hunyadi Matyas No. 3 spring a weaker water than the Hunyadi Matyas No. 2?

A. It would appear so from the analysis.

X Q. 656. At what price was it sold by you?

A. We sold it as low as five dollars a case.

X Q. 657. And the price of your Hunyadi Matyas water otherwise was what?

A. Eight dollars.

X Q. 658. Per case?

A. Per case, and in larger quantities, I believe six dollars and a half at that time.

X Q. 659. Do you know what the name of the Hunyadi Matyas No. 3 spring was before it was baptized Hunyadi Matyas No. 3?

A. I do not.

X Q. 660. You never inquired?

A. My impression is that a new spring was opened on Mattoni & Wille's grounds where all the springs are located at Budapesth.

X Q. 661. When you made your contract of lease in 1890, where were the bottles labeled?

A. At Budapesth.

X Q. 662. How long did that continue?

A. I believe until about a year ago.

X Q. 663. Where were they labeled then?

A. They were labeled here.

X Q. 664. Are they labeled here now?

A. Yes, sir.

X Q. 665. Do you mean to say that the bottles arrive without any labels from abroad?

A. No, they have a strip on saying "Matyas water."

X Q. 666. What is that strip?

A. Just a short small label.

X Q. 667. Can you produce one of those labels?

A. I don't know if I can. I will try to do so. They might have been all relabeled.

X Q. 668. What becomes of that strip here when a bottle arrives?

A. Our label is simply pasted over.

613 X Q. 669. So that you cover up the strips which are underneath?

A. Yes, sir; and put the same label on that the water had before.

X Q. 670. Is that done at your establishment?

A. Yes, sir.

X Q. 671. It has been done so for a year past?

A. I don't know exactly the time, but my impression is about a year.

X Q. 672. Who prints your labels?

A. At present?

X Q. 673. Yes.

A. Stettner, Lombard & Co.

X Q. 674. How long have they printed them?

A. I can't tell.

X Q. 675. About how long?

A. It may have been a year; they may have printed some before; I don't know.

X Q. 676. What was the reason of the change in printing and labeling bottles?

A. The change was brought about by that decision in Hungary about 1895 or 1896, whereby the trade-marks of various Hunyadi waters were cancelled by the act of the minister of Hungary, and therefore we had to label the waters here with the same labels to continue the trade.

X Q. 677. Do you know whether this red and blue label which you had adopted was ever registered in Hungary for Hunyadi Matyas water?

A. I do not.

Adjourned to Wednesday, March 2, 1898, at 2 p. m.

SAXLEHNER
vs.
EISNER.

NEW YORK, *March* 2, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the cross-examination of MORITZ EISNER by Mr. KNAUTH:

X Q. 678. Have you found the correspondence of your
614 company with Mattoni & Wille during the years 1889 to 1893?

A. I have found the correspondence from the year 1892 on. I had one of our clerks search all yesterday afternoon from the time

I got to my office, and I myself searched this morning, and all I could find was 1892.

X Q. 679. Previous to the time had you no letters in your possession from Mattoni & Wille dating in the years 1889, 1890, and 1891?

A. No; we moved from 6 Barclay street to our new building and had a fire there in Barclay street, and it may have been that they were all spoiled or destroyed, but since we have had a register file or Amberg cabinet file, the letters were found intact.

X Q. 680. Have you been able to find any press copies of your letters to Mattoni & Wille dating from the years 1889, 1890, and 1891?

A. I could not find any; they may have been spoiled in the fire.

X Q. 681. What you have produced here are a set of loose letters and certain loose press copies of letters written by your firm to Mattoni & Wille. Can you state whether this is all the correspondence which passed between you and Mattoni & Wille during the years 1892 and 1893?

A. I surmise so; otherwise it would have been found in the same cabinet.

X Q. 682. Have you produced everything you can find?

A. I have produced everything that I have been able to find after diligent search, devoting, as I have stated, my own time this morning and in fact two clerks' time yesterday afternoon.

X Q. 683. In a letter dated January 18, 1893, written by Mattoni & Wille to your company, I find the following sentence:

"With reference to the labels we have made reclamation with the printing establishment of Posner & Son, which also happens to print the Arpad labels; we enclose the letter of justification of this establishment. We also cause our labels to be printed by this firm and never had occasion to complain about the red. Therefore it seems that unusual circumstances might have played a part in the lot that was bleached."

Do you recollect to what letter of your concern this refers?

A. I don't recollect it, but I presume the complaint was the color was not distinctly brown, because we insisted upon brown and I presume this house printing the label for the Arpad, which was red, thought ours should be also more on the red than on the brown, but we distinctly instructed them to have that distinction in our labels that the Matyas label should be brown.

X Q. 684. Can you produce the letter by which you make this complaint? I do not find it among the letters which you have produced.

A. I have stated that I made diligent search for all the papers and would have produced it had I found it.

X Q. 682. This letter just quoted by me does not speak of any brown, but speaks of complaints about the red in the label. Are you sure that you called it brown in your letter?

A. Well, I suppose that is the complaint we made that they got in the red instead of the brown, or probably bordering on the red.

X Q. 683. Have you any definite recollection of that matter?

A. I have no definite recollection of the matter. I do recollect making these complaints at one time, that the labels appeared a little more reddish than at another and we wanted a distinctly brown center field.

X Q. 684. How long did Mattoni & Wille continue to print or have these labels printed in Hungary for your use?

A. I cannot distinctly state now. It seems to me until a year ago.

X Q. 685. A year ago was February or March, 1897?

A. It may have been 1896, the end of 1896; I won't be definite on that in reference to the date.

X Q. 686. Have you anything in your office in the way of memoranda or letters which would show this?

A. I might be able to trace it.

X Q. 687. Didn't you have some correspondence with
616 Mattoni & Wille about leaving off these labels from the bottles?

A. I stated in my cross-examination yesterday that when that decision or edict, whatever it was, of the Hungarian minister was given we had imported a very large amount of this water previous to that for a winter supply, I think, and had sufficient on hand for six months probably, and only after we began to label the bottles here.

X Q. 688. What instructions did you give Mattoni & Wille with reference to labels?

A. To ship it without labels.

X Q. 689. Did they ship it without labels?

A. They shipped it with a small label on the bottom stating simply Matyas, I believe.

X Q. 690. If you gave them instructions to ship these bottles without labels, how do you explain the fact that they shipped them with these labels?

A. I can't tell, except that they did not want to mix it up with their other waters.

X Q. 691. Did you not give them instructions about putting such a different label on the bottles?

A. I don't think so.

X Q. 692. Have you any recollection on the subject?

A. I have no recollection on that subject. I know we wrote them to ship it without labels and we would label it here, and when they came here having this strip on we simply labeled over that small label.

X Q. 693. Is it a fact that, since the time when Mattoni & Wille discontinued the labeling of the bottles with your large red and blue label all bottles coming from them to your establishment had this small label on which you had described?

Mr. Coe: That portion of the question which describes the Hunyadi Matyas label as red and blue is objected to as contrary to the facts.

A. Since Mattoni & Wille ceased to put on our brown and blue

label all may have had that strip label on; I cannot tell because I do not examine the bottles nor do I open the cases. I do
617 not think I have seen more than three of the bottles since that time myself, when they came in. That is entirely out of my province.

X Q. 694. You have stated that Mattoni & Wille pasted the Hunyadi Matyas labels on your bottles until about a year ago; I find among the exhibits of Hunyadi Matyas water that some exhibits like Osterman No. 1, show an additional blue strip containing the printed word- "Hungarian aperient water bottled at Budapest" covering the narrow strip where the two ends of the label meet. When was that strip first used?

A. I cannot distinctly recollect when that was used first.

X Q. 695. What was the object of that strip?

A. No particular object at all. I believe, if I recollect right, some of our competitors selling Hunyadi waters like the Hunyadi Lajos, and maybe the Janos people, told the trade that ours was not an imported water because it hasn't the brand of the spring on the bottom of the bottle blown in the glass and I think for that purpose the strip was put on to show that it was bottled at the spring.

X Q. 696. How do you know that that was the reason?

A. That is my recollection about it.

X Q. 697. When was that the case?

A. Oh, some years ago, I can't tell.

X Q. 698. You don't know the year?

A. No.

X Q. 699. Was that additional strip put on right from the beginning after the contract had been made?

A. No, sir; I don't think it was.

X Q. 700. Are the labels of Complainant's Exhibits Wueeks and Potter Bottle No. 1 and Osterman No. 1 both printed in Hungary?

A. I can't tell; it is impossible for me to tell. One has the brand that we distinctly ordered and the other has a more reddish tint. It may have been the color of the label that we complained about, but I cannot tell. I have no way of telling.

X Q. 701. Did you give instructions to Mattoni & Wille to
618 paste on this additional strip which I have just referred to, in writing?

A. I cannot tell, Mr. Knauth.

X Q. 702. You have no recollection about it?

A. I have no recollection at all about it.

X Q. 703. I have here another bottle of Hunyadi Matyas water on which this additional strip containing the words "Hungarian Aperient water bottled at Budapest" seems to be part of the label itself so as to cover up the whole body of the bottle. When was that style adopted?

A. It is impossible for me to tell as to these details. Mattoni & Wille may have done that or the printer may have done that simply to save the additional pasting.

X Q. 704. You don't recollect giving any instructions about it?

A. I don't recollect giving any instructions about it.

X Q. 705. Do you know when this method was followed of having the label printed as one, with this additional strip embodied in the label?

A. I do not; it must have been probably after 1893 from the fact that the Chicago exhibition is mentioned here.

X Q. 706. Are you now selling bottles with this kind of label containing that additional strip as a part of the label?

A. I don't think our present label has that strip on.

X Q. 707. When did you change that again?

A. I don't think that we paid any particular attention to that.

Complainant's counsel offers the bottle last referred to in evidence and the same is marked "Complainant's Exhibit Defendant's Additional Strip Bottle, March 2, 1898, J. A. S., ex'r."

X Q. 708. Were you in Budapest in the year 1893?

A. Yes.

X Q. 709. Were you in Budapest in the year 1894?

A. I don't know if I was in Budapest in 1894.

X Q. 710. In 1895?

A. I don't think I have been in Budapest since 1893.

X Q. 711. Do you know?

619 A. It is very hard for me to say positively. In 1893 I know positively, because I know exactly in what connection I was there. Yes, I think I was in Budapest in 1896.

X Q. 712. But not in 1895?

A. No, not to the best of my recollection. I was in Budapest in 1896 for a short time to visit the exposition there.

X Q. 713. At what time was that in 1896?

A. During the summer of 1896; it may have been in June, July or August, but during the time of the exposition there.

X Q. 714. I find that the letter of Mattoni & Wille of September 14, 1893, contains the following sentence: "Inasmuch as we already reported to you a short time ago that the minister of commerce might bring the trade-marks of the Ofen bitter waters into orderly condition, we let the matter rest at present and shall, if no obstacles will then be in the way, also cause your mark to be registered on the basis of the trade-mark law." Can you produce the letter in which this was stated and which is here referred to in the letter of September 14, 1893?

A. I have produced all the letters I could find. It may have been a letter that I probably took along to Europe when I went out there.

X Q. 715. You can't produce it now?

A. I haven't got it; it may have been something that I wanted to talk over.

X Q. 716. Is this blue label which I now show you like the labels which Mattoni & Wille pasted upon the bottles after the Hungarian decision of 1896?

A. This appears like the label or like the strip on the bottle.

Complainant's counsel offers the label referred to in evidence and

the same is marked "Complainant's Exhibit Mattoni & Wille Label, March 2, 1898, J. A. S., ex'r."

Defendant's counsel objects to the introduction of the exhibit as immaterial and irrelevant.

620 X Q. 717. Are you able today to say from an examination of your books what quantities of royal Hungarian bitter water you sold from 1889 to 1890?

A. I can state as much as I could find, as I couldn't find the sales book in 1889, or at least looking for the letters I hadn't much time to search for the sale book. I went through the account of Mattoni & Wille, and from the account I can state that at least 20,500 bottles of royal Hungarian bitter water were imported during the years 1889 and 1890.

X Q. 718. Can you state what quantities of Hunyadi Matyas water were imported and sold from 1890 up to the present time by the year?

A. In 1890, 65,000 bottles; that is when we began to advertise this water. In 1891, 180,000 bottles. In 1892, 199,100 bottles. In 1893, 127,750 bottles; the decrease is on account of the surplus stock of Hunyadi Arpad which we closed out during that year. 1894, 271,200 bottles; 1895, 291,350 bottles; 1896, 285,300 bottles; 1897, 247,300 bottles.

X Q. 719. Where are those figures taken from?

A. They were made up for me from the sales book.

X Q. 720. By whom were they made up?

A. They were made up by our stock-book clerk.

X Q. 721. Do these figures include consignments on which you made your orders?

A. They mean absolute sales; there may have been some few consignments included, but they would be deducted from the yearly sales after the consignment has been closed out and these goods returned, but the figures mean absolute sales.

X Q. 722. Can you produce the pamphlet of Saxlehner to which you referred in yesterday's session?

A. I herewith produce it.

X Q. 723. Where did you get this pamphlet?

A. I obtained it from Paul Scherer.

X Q. 724. At what time?

A. I cannot tell; years ago.

X Q. 725. How many years ago?

A. I cannot tell whether it is two years, three years, four years or five years; I cannot tell when I got it. I had forgotten
621 that altogether until you brought it out the other day, and then I searched amongst the Scherer papers. I know it has been in my possession for some considerable time.

X Q. 726. But you don't know how many years?

A. I don't know; I never paid much attention to it. I have some papers from Scherer referring to that suit brought against him by the Hunyadi Janos people for importing Hunyadi, and amongst these papers I had that.

X Q. 727. How do you know that this paper was issued or published by Andreas Saxlehner?

A. I have no other evidence but the paper itself as to the issue of this paper, but it was a known fact amongst the trade——

X Q. 728. No, don't state that as to known facts; I am asking you how do you know?

A. I have no other evidence as to the publication of this paper.

X Q. 729. When did you first learn of the decision of the Hungarian minister of commerce which I now show you?

A. I didn't know of any decision in 1894. This is the first time I ever saw this paper or anything pertaining thereto. I suppose that must have been pending.

X Q. 730. You mean that Mattoni & Wille never informed you that the minister of commerce of Hungary in the year 1894 rendered a decision by which their trade-marks registered by them for Hunyadi Matyas were stricken from the register of trade-marks because, as the decision states, "According to the opinion of three experts consulted by the chamber, such trade-marks are similar in composition, design and color, and also for general impression to the trade-marks previously registered for the firm of Saxlehner and have been found to be imitations of same and apt to mislead the public."

Defendant's counsel objects to the question as immaterial and irrelevant.

A. We have not been informed to that effect; on the contrary, we have been informed——

Mr. KNAUTH: I object to that. You have answered the question.

622 Complainant's counsel offers in evidence a duly certified copy of a decision of the Hungarian minister of commerce, dated June 6, 1894, cancelling the trade-marks Nos. 1579, 1580, 1581, 1582 and 1583, and also Nos. 1892 and 1893, and the same is marked "Complainant's Exhibit Hunyadi Matyas Decision of 1894, March 2, 1898, J. A. S., ex'r."

Defendant's counsel objects to the introduction of said paper in evidence as immaterial and irrelevant.

Complainant's counsel also offers in evidence duly authenticated copies of three of the trade-marks cancelled by the foregoing decision, namely, Hungarian trade-mark No. 1582 for the red and white Hunyadi Matyas label, 1892, for another red and white Hunyadi Matyas label and 1580 for a red and white Franz Deak label, all of Mattoni & Wille, and the same are marked "Complainant's Exhibit Mattoni's Registered Labels Nos. 1, 2, and 3, March 2, 1898, J. A. S., ex'r."

Defendant's counsel objects to the introduction of said exhibits as immaterial and irrelevant.

Complainant's counsel also offers in evidence Hungarian certificate of registration of Mattoni & Wille's red and white Graf-stafeu Szechenyi label, registration No. 1579, and the same is marked

"Complainant's Exhibit Mattoni's Registered Label No. 4, March 2, 1898, J. A. S., ex'r."

Defendant's counsel objects to the introduction of the exhibit as immaterial and irrelevant.

X Q. 731. When did you first learn of the decision of the Hungarian minister of commerce cancelling the verbal trade-mark Hunyadi Matyas and five illustrated marks for Hunyadi Matyas
623 registered by Mattoni & Wille, the decision being dated October 7, 1896, which I now show you?

A. We learned of this by cable in which Mattoni & Wille informed us that the minister of commerce had cancelled said trademarks by the German phrase "Gewaltakt," which in the English language would mean that he had taken the law into his own hands and simply issued an edict to that effect. I cannot exactly state, but it seems to me it was in 1896, in the fall or winter.

X Q. 732. Can you state the month?

A. I cannot tell exactly. I cannot tell from memory now when we received said notification; it was either in the fall or winter of 1896. We also learned that Mattoni & Wille had applied for a reversal of this decision to His Majesty, the Emperor of Austria, and said appeal was still pending.

Mr. KNAUTH: Objected to as volunteered and irresponsive and also as secondary evidence.

X Q. 733. Did you not receive a copy of this decision of October, 1896?

A. I did not receive a copy from Budapest, but the copies were circulated here shortly afterwards in the United States and I obtained one of the printed copies.

X Q. 734. From the firm of Andreas Saxlehner?

A. From the firm of Andreas Saxlehner.

X Q. 735. Did you read it?

A. I don't recollect now whether I read it all through, but most likely I have read it.

X Q. 736. Did you make any change in your label after reading it?

A. Not to my knowledge.

Complainant's counsel offers the decision referred to in evidence and the same is marked "Complainant's Exhibit Hunyadi Matyas Decision of 1896, March 2, 1898, J. A. S., ex'r."

Counsel for defendant objects to the introduction of the exhibit as immaterial and irrelevant.

624 X Q. 737. I notice that Defendant's Exhibit Hunyadi Matyas Apothecary Advertisement contains a certificate of Dr. Charles Tormay of Buda Pesth, August, 1862. How many copies of this advertisement were issued?

A. I stated I believe in my direct examination that this paper claimed to issue about 5,000 copies, and that advertisement was inserted in various issues as stated in my direct examination.

X Q. 738. In this advertisement you mention Hunyadi Matyas, Hunyadi Janos and Hunyadi Arpad by referring to them as follows: "Chemical analysis of the different Hunyadi springs." Which Hunyadi Matyas spring did you refer to in this advertisement?

A. The one from which our water came; I took the analysis, I believe, from the label.

X Q. 739. You mean Hunyadi Matyas No. 2?

A. Hunyadi Matyas No. 2.

X Q. 740. And the analysis of this spring was given on the label, was it?

A. Yes, sir.

X Q. 741. I notice that in Defendant's Exhibit Druggists' Circular, July, 1890, you refer to certificates of Charles Tormay of August, 1862, Joseph Riedl, of July, 1872, Francis Brunner, of May, 1862, F. Lorinser of April, 1865, and Baron von Rokitansky of 1877, together with a medal of merit of the exposition at Vienna in 1873. How many copies of this advertisement did you publish?

A. As stated in my direct examination, I had reason to believe that this paper circulated amongst ten thousand retail druggists in the country and that we inserted the advertisement or similar advertisements on the dates stated in my direct examination in connection with this exhibit.

X Q. 742. This advertisement was also meant to apply to the water of the Hunyadi Matyas No. 2 spring?

A. It was to apply to the spring Hunyadi Matyas from which our water was drawn.

X Q. 743. And that was No. 2?

A. No. 2 spring from which our water was drawn.

X Q. 744. What personal knowledge have you of the in-
625 sertion and publication of these advertisements which you have produced in your book?

A. I attended to the advertising department of the house and I gave the orders for the insertions.

X Q. 745. Is that all?

A. I looked after them after they had been inserted and verified the bills, etc.

X Q. 746. Did you make the statement or search showing the numbers of advertisements and dates when they were made?

A. I stated in my direct examination that I had one of my employés make the search, but I have looked over several of the papers myself.

X Q. 747. Who is that employé?

A. Mr. Lissner. He furnished me with such copies as the papers could spare from the old files, and those I have seen myself.

X Q. 749. Was this last-mentioned advertisement of the Druggists' Circular of July, 1890, ever published in 1891?

A. I can't tell whether this advertisement was published in 1891. It appears that it was not.

X Q. 750. As I understand your testimony, this advertisement, after having first been made in 1890, was continuously readvertised in 1892, 1893, 1894, 1895, 1896 and 1897?

A. Not this particular advertisement, but similar advertisements; that is advertisements announcing the Hunyadi Matyas water.

X Q. 751. But you have no copy of this and similar advertisements, have you?

A. I may have.

X Q. 752. I mean you haven't produced any?

A. I have not produced any.

X Q. 753. In your circular, Defendant's Exhibit Hunyadi Matyas Notice No. 2, you state of the Hunyadi Matyas water that you are the sole lessees of the spring, and that this water has been favorably known on the continent for more than thirty years past. What evidence had you at the time when this circular was issued, 1890, that this water had been on sale for thirty years past?

A. The pamphlet that we received with the testimonials
626 from Mattoni and Wille, which was similar in character to the pamphlet which we produced here and which is in evidence, marked Defendant's Exhibit Hunyadi Matyas Label Circular, which had testimonials printed thereon dated 1862, and from the fact that there was a decision about this water in 1873, I had reason to believe that that spring had been in existence for many years prior to that decision.

X Q. 754. What reason had you to believe that this spring, Hunyadi Matyas No. 2, had existed in 1873, if there had been a decision made in that year about a spring called Hunyadi Matyas, not No. 2?

A. I did not pay any particular attention to the number of the spring, as I understood the fact to be that there were many springs dug in the ground in these Hungarian bitter-water fields where the water deposits, and they were all called Hunyadi Matyas springs; whether there was one called No. 1 or No. 2, it was simply probably for convenience sake.

X Q. 755. What other springs did you know at that time, in 1890, that were also called Hunyadi Matyas springs?

A. I saw various springs there.

X Q. 756. Do you mean they were called Hunyadi Matyas springs?

A. There were springs owned by Mattoni and Wille of Ofner bitter water.

X Q. 757. And they were all called Hunyadi Matyas springs?

A. I don't know that; I only know that one spring particularly was pointed out to me from which our water would be drawn in future.

X Q. 758. You have just stated that there were numerous springs which were called Hunyadi Matyas springs. Where were those springs?

A. I say there were numerous springs located on the ground of Mattoni and Wille.

X Q. 759. You haven't answered my question yet; is what you have said the best answer you can make to it?

A. The very best answer I can make to it; I knew only of that one from which our water would be drawn.

627 X Q. 760. You didn't know any other Hunyadi Matyas spring at the time, did you?

A. There may have been.

X Q. 761. No, did you know at the time another?

A. The way it was explained to me is that some springs show absolutely weaker water and the others show a little stronger water.

X Q. 762. I don't care about some springs, but I mean Hunyadi Matyas springs?

A. I paid no particular attention to it; I was satisfied with the explanation that our water would be drawn from that one particular spring.

X Q. 763. And that was the only Hunyadi Matyas spring that you knew at that time, was it?

A. I can't answer that; I may have been shown others.

X Q. 764. But you don't know?

A. I have stated that I was shown various springs there.

X Q. 765. Do you mean that those various springs were called Hunyadi Matyas springs?

A. I can't recollect that.

X Q. 766. You stated in this same circular that the chemical analysis of this spring proved it to be one of the most concentrated of sulphate of magnesia or aperient bitter waters, and that it was far superior to either the Hunyadi Janos or Hunyadi Arpad water. Had you ever tried either the Hunyadi Janos or the Hunyadi Arpad water, to compare the same with this Hunyadi Matyas water?

A. I compared the analysis as it was published in various works.

X Q. 768. Published by whom?

A. By the authors of such works.

X Q. 769. What works?

A. The Heillkuellen analysis; I have said work in my possession.

X Q. 770. Will you produce it at the next session?

A. Yes, sir.

By Mr. COE:

Q. 780. You said various works; are there any others?

A. I have seen others.

By Mr. KNAUTH:

X Q. 781. Have you any other works in your possession that you can produce on this point?

628 A. I have not, but I have seen the comparative analysis of these waters as published by the Hunyadi Arpad.

X Q. 782. In the Defendant's Exhibit Hunyadi Matyas Decision you say of the Hunyadi Matyas water sold by you, "It is the oldest of the Hunyadi springs." What evidence have you in your hands to make this statement?

A. I have no particular evidence in my hands except what I referred to in my previous answer.

X Q. 783. What do you refer to in your previous answer as to the fact that this was the oldest of the Hunyadi springs?

A. That may have been simply an advertising statement; probably I meant to say that it was one of the oldest.

X Q. 784. You mean that you did not mean to say it was the oldest?

A. I couldn't tell what I meant to say at that time eight or nine years back.

X Q. 785. Well, it is a fact, is it not, that at that time you had nothing in your hands to prove that it was the oldest Hunyadi water?

A. I had nothing more than what I have stated in my examination to go by.

X Q. 786. You stated in another advertisement produced by me that the Hunyadi Matyas spring was the original Hunyadi spring: Was that also a mistake on your part? I refer to Complainant's Exhibit Druggists' Circular Publication.

A. It was simply an advertising statement.

X Q. 787. You mean by that that it was not true?

A. I don't mean to say that at all.

X Q. 788. What do you mean by that, then, by saying that it was simply an advertising statement?

A. The original Hunyadi water refers simply to the Hunyadi Matyas water.

X Q. 789. Is not that equally untrue?

A. I don't doubt for a minute that it is the original Hunyadi Matyas water.

X Q. 790. But you did not say in your advertisement the original Hunyadi Matyas water; you said the original Hunyadi water. Now, was that true or not?

629 A. "Of superior quality introduced to the trade at low prices;" that is where the original refers to. There is no period after the word "water" and consequently you have to read on. It says, "The original Hunyadi water of superior quality introduced to the trade at low prices." There is no doubt that the Hunyadi Matyas water is the original water that has been introduced at a low price to the trade.

X Q. 791. And in order to convey that impression you printed the words "The original Hunyadi water" in large capitals and the words "of superior quality introduced to the trade at low prices" in smaller characters underneath?

A. The paper would not be large enough if all would be printed in the same type. There is no particular purpose except——

X Q. 792. Do you intend in this explanation to be any more truthful than in these advertisements?

Mr. Coe: Objected to as an entirely unfair statement to the witness.

A. I have tried to tell the exact truth in every particular to the best of my recollection.

X Q. 793. By using these words "the original Hunyadi water"

did you mean to refer to the statement in your circular that this water is the oldest of the Hunyadi waters?

A. Not at all; the druggists' circular goes to the druggists and the other circular letter that you refer to went to physicians, so that one could have no bearing on the other.

X Q. 794. You mean, then, that to physicians you wanted to state that this water was the oldest of the Hunyadi springs, while to druggists you did not want to convey such an impression; is that correct?

A. At the time these circulars were gotten out, I did not think what impression would be conveyed.

X Q. 795. Who got up the little picture of the Hunyadi Matyas Spring grounds which is contained on Defendant's Exhibit Hunyadi Matyas Mailing Slips Nos. 1, 2 and 3?

630 A. This is a reproduction of a picture that appeared on the original pamphlet which we obtained from Mattoni & Wille.

X Q. 796. Have you ever taken the trouble to compare the analysis of the Hunyadi Matyas No. 2 spring with the analysis of the original Hunyadi Matyas spring?

A. I do not know what you refer to.

X Q. 797. Don't you understand that, if you have a Hunyadi Matyas No. 2 spring, there must be another spring called Hunyadi Matyas No. 1 or Hunyadi Matyas?

A. If there ever was one or is one, I have not seen the analysis of it.

X Q. 798. So you have never compared the two waters?

A. I am only familiar with the analysis of No. 2 spring.

X Q. 799. Some years later you got the water from a spring then newly dug called Hunyadi Matyas No. 3; how did the analysis of that water compare with the analysis of your spring Hunyadi Matyas No. 2.

A. The No. 3 appears to be a weaker water; that is it contains less of the sulphate of magnesia and sulphate of soda.

X Q. 800. Then that was not the same chemically as the No. 2 spring?

A. Chemically it was the same.

X Q. 801. You mean it was the same?

A. Chemically it was the same.

X Q. 802. What do you mean by that?

A. I mean it contains the same constituents.

X Q. 803. Ah, that is different, but you don't mean the same constituents in the same proportions, do you?

A. I don't mean of the same proportions, but it contains the same chemical constituents.

X Q. 804. That is a different thing. Do you mean that if the two substances contain the same chemical constituents but in different proportions, they are chemically the same?

A. I am particularly referring to Hungarian bitter waters or mineral waters.

X Q. 805. I am not asking you about Hungarian bitter
631 waters now; I am asking you a general question?

A. If two solutions contain the same chemical ingredients——

X Q. 806. In different proportions?

A. In different proportions, I would consider them chemically the same except as differing in their proportions. A solution of sulphate of magnesium and sulphate of sodium is the same as another solution of sulphate of magnesium and sulphate of sodium, only different in their proportions.

X Q. 807. How far from each other are the two springs Hunyadi Matyas No. 2 and Hunyadi Matyas No. 3?

A. Some distance; I can't tell exactly. Within one mile I should think, on the grounds of Mattoni & Wille.

X Q. 808. Don't you know in what portion of these grounds the spring No. 3 is situated?

A. I couldn't describe it now.

X Q. 809. Don't you know in what portion of the grounds the spring No. 2 is situated?

A. I know that the spring No. 2 is right near the bathing establishment where the salt baths are.

X Q. 810. That is about the center of the grounds, is it?

—. If my recollection serves me right, that is about the center of the grounds.

X Q. 811. Is not the proportion of ingredients quite different in the water of spring No. 3 from what it is in spring No. 2?

A. The proportion of the ingredients is different.

X Q. 812. Is there not in the water of Hunyadi Matyas spring No. 2 a very large preponderance of magnesia sulphate over sulphate of soda?

A. Yes, sir.

X Q. 813. And that preponderance is only very slight in spring No. 3, isn't it?

A. Yes, sir.

Adjourned to Thursday, March 3, 1898, at 1 p. m.

632 SAXLEHNER
v.
EISNER.

NEW YORK, *March* 3, 1898.

Met pursuant to adjournment.
Present: Counsel as before.

Continuation of the cross-examination of MORITZ EISNER.

By Mr. KNAUTH:

X Q. 814. Did you have any resident agent in Europe during the year 1890, and thereafter?

A. I don't know whether we had one in 1890, but we had one thereafter.

X Q. 815. Who was he?

A. Mr. Ludwig Olieven.

X Q. 816. To what part of your business was he attending?

A. All our European business.

X Q. 817. Where did he reside?

A. In Berlin.

X Q. 818. Do you know when he was first sent to Berlin?

A. He was residing in Berlin at the time he entered our emplo

X Q. 819. You mean at the time when you made the arrang ment with him he was a resident of Berlin?

A. Yes, sir.

X Q. 819½. When was that?

A. Maybe in 1891 or 1892, I can't exactly recollect now.

X Q. 820. How long did he continue to represent your interest abroad?

A. He still continues to represent our interests abroad.

X Q. 821. You mean he has continued to represent you there?

A. Yes, sir.

X Q. 822. That is the Eisner & Mendelson Company?

A. Yes, sir.

X Q. 823. Was it he who advised you of the intended sale o Ungar's springs to Saxlehner?

A. It may be possible that he advised us of it.

X Q. 824. How was your business with Mattoni & Wille done Was it all done directly from your office in New York with the offic of Mattoni & Wille in Budapest or also through Olieven?

A. Mr. Olieven often goes there when there is anything of im portance.

633 X Q. 825. Do you know whether he attended for Matton & Wille to the registration of their trade-marks in Berlin i the German patent office?

A. I do not.

X Q. 826. Why did you give up the sale of the Hunyadi Laszl water?

A. Because it was higher-priced than the Hunyadi Matyas and we couldn't get any more for it, so we preferred to push the Hunyadi Matyas.

X Q. 827. What was the price that was charged to you for the Hunyadi Laszlo?

A. If I recollect right it was about seventeen francs per case.

X Q. 828. Per case of fifty bottles?

A. Yes.

X Q. 829. But you obtained this also from Hungary, did you not?

A. Yes, sir.

X Q. 830. Did they charge it in francs instead of florins?

A. I can't recollect whether the charges were in francs or in florins; they may have been in florins equivalent to seventeen francs. I think the contract states in francs. It may also be seventeen florins for a hundred bottles. I can't exactly state unless I refer to it.

X Q. 831. When you got the water from Hunyadi Matyas spring No. 3, what price was charged you for that by Mattoni & Wille?

A. I think we got that water less the allowance that we allowed Mattoni & Wille for filling of fifty kreutsers a case.

X Q. 832. You mean that you got it at the same price as the Hunyadi Matyas No. 2?

A. We reimbursed them the same amount as for the Hunyadi Matyas No. 2 for bottles and everything else except the amount that we allowed them for filling, which concession I think we got out of them so as to allow us to compete.

X Q. 833. Was not the price which was charged to you for Hunyadi Laszlo a very low price as compared with Hunyadi Matyas?

A. No, much higher.

X Q. 834. How much higher was it?

A. If my recollection is right, of seventeen francs, which
634 is equal to eight and a half florins, it was three florins a case higher.

X Q. 835. Than the charge for Hunyadi Matyas?

A. Yes, sir.

X Q. 836. Were you charged by Mattoni & Wille for the shipment of Hunyadi Matyas made to you in accordance with the terms of the contract of 1890?

A. Yes, sir.

837 X Q. Was there any modification or variation from that made thereafter?

A. None whatever, except as to the No. 3.

838 X Q. You mean that the prices charged by Mattoni & Wille for the Hunyadi Matyas No. 2 have been continuously the same since 1890?

A. We reimbursed them the same amount since 1890.

839 X Q. And that was the way in which you paid them?

A. Yes, sir.

840 X Q. Was there not a change made in that at the time when you commenced to print the labels yourselves instead of having them printed at Budapest?

A. That is since we are printing the labels here?

841 X Q. Yes?

A. Yes, he allows us the difference.

842 X Q. How much is the difference?

A. We haven't figured it up yet.

843 X Q. You mean that has not been settled with Mattoni & Wille?

A. No, sir.

844 X Q. Had not the fact that the label for the Hunyadi Laszlo water was cancelled in the year 1894 by the Hungarian minister of commerce upon the complaint of Emilie Saxlehner something to do with the discontinuance of your sales of the water?

A. Nothing whatever. I did not know that that label was cancelled in 1894. If I recollect right, they wrote us in 1894 or 1895 why we didn't buy any more.

845 X Q. What do you mean by that?

A. The company from which we bought the Laszlo.

846 X Q. But you have stated heretofore that you continued to sell this until 1895?

635 A. I say it may be 1894 or 1895 when we made the last importation or after we received the last importation, that we received a letter why we didn't buy any more.

847 X Q. Then you mean that it was purely an accident that you happened to discontinue the sales of that water at the time when this decision came out in Hungary cancelling the Hunyadi Laszlo label?

A. As I stated, I do not know that that label was cancelled in 1894.

848 X Q. I find that similar decrees cancelling numerous labels in the year 1894 were rendered by the Hungarian minister of commerce in the course of the year 1894 upon complaints brought by Emilie Saxlehner for infringement of your trade-mark or label rights, such decrees being rendered against Edward Steinkopff, Moritz Hirschler, the firm of Moritz S. Blausohne the firm of Johann Loser and others; do you mean to say that at that time you knew nothing whatever of these litigations and of the issuing of the decrees and the cancellation of the various trade-marks in the register of commerce and industry of Budapest?

Mr. COE: Objected to as incompetent, irrelevant and immaterial.

A. Not to my recollection.

849 X Q. Have you no recollection at all upon the subject?

A. The only recollection I have is a conversation I had with Mr. Mattoni or his manager; I don't distinctly recollect who it was, stating that Mr. Saxlehner was trying the same thing he tried once before in reference to the Hunyadi trade-marks and they didn't take any stock in it at all; he treated it very lightly.

850 X Q. That was then apparently at the time when Saxlehner had not succeeded in obtaining any decrees?

Mr. COE: Same objection.

A. I can't tell; I don't know when that was, whether it
636 was in 1894 or 1895. It was some conversation I recollect having where I was told the facts as I have stated. It may have been already decided and appealed. I do not know what the status was, for, as I stated in my examination of yesterday, I paid very little attention to it as I couldn't believe that he would succeed in getting a cancellation of trade-marks that had been in existence for such a number of years.

851 X Q. When you made your first investigation into the sale of Hunyadi Matyas water in the year 1889 and when you received the paper which you have called a copy of the decision of 1873—and I will not criticise the correctness of that at present—did you not also obtain or see the other decisions relating to the same application which had preceded this 1873 decision?

A. I have exhibited all that I received and all that I have seen

and what preceded would not have interested me as the one that I should go by.

852 X Q. I show you now an authenticated copy of the petition of Ignatius Markus for leave to call a bitter-water spring dug by him on the property of Mr. Alexander Reso Ensel by the name of Hunyadi Matyas; do you recollect having seen that petition at the time?

A. I stated in my previous answer that I had seen no other papers at that time nor had I seen this paper or anything that pertains to this thereafter.

853 X Q. Won't you read it over and try to refresh your recollection on the subject?

A. My recollection is very clear on the point because the name of Alexander Reso Ensel never appeared to me in my life.

854 X Q. When you obtained this so-called certified copy of the decision of 1873, did you not make inquiries as to the papers of the litigation or proceeding relating to that matter?

A. I did not.

X Q. 855. When you received the paper which has been called a Hunyadi Matyas trade-mark registration of 1877, did you not make inquiries as to what the labels or trade-marks were which
637 you have stated to be attached to the paper, but which are not even attached to the paper?

A. I did not; the text states that the Hunyadi Matyas was a registered trade-mark and that satisfied me.

X Q. 856. I will take issue with you on that point; the text does not state that Hunyadi Matyas was a registered trade-mark but that Mattoni & Wille had registered trade-marks for four springs owned by them and called by them respectively by the names which they have given. Did you not make inquiry as to what these trade-marks were?

A. As a business man I would accept that as sufficiently authentic for business purposes.

X Q. 857. You did not go any deeper into it?

A. I had no reason whatever.

X Q. 858. That did not strike you as peculiar, that to this certificate, which recited that attached to it were the four labels, there were no such labels attached, but a pamphlet or business paper of Mattoni & Wille which on its back showed a photolithograph or picture of one label only?

A. It did not strike me as peculiar, because we were only interested in that one label.

X Q. 859. Did you paste on this pamphlet or circular of Mattoni & Wille to this document, or was it handed to you in the shape in which it is presented with this pamphlet pasted on to the body of the certificate?

A. I believe it came that way by mail just as I introduced it.

X Q. 860. Will you please state whether the thread which connects the paper with the seal also goes through this pamphlet or circular or whether it does not?

A. It does not.

X Q. 861. Have you any recollection as to when this pamphlet was pasted on?

A. I have no recollection whatever, except that my best recollection is that we received it this way by mail.

X Q. 862. Did you not see it theretofore in Budapest?

A. No, sir.

X Q. 863. What did you see in Budapest with reference to that proceeding?

638 A. I was told about it and they promised to send me the matter by mail because I couldn't wait for it. That was in 1869.

X Q. 864. Did not Mr. Mattoni at that time tell you that on the petition of Iguatius Markus the chief physician of the metropolis Buda had reported to the town council that Saxlehner protested against the proposition to give the spring the name Hunyadi, because thereby the commerce of Saxlehner's spring already well known and in demand abroad would suffer, and that the town physician had recommended that attention should be paid to this protest?

A. There was only a general conversation. I was informed that some litigation had taken place in which Saxlehner had been defeated, and all I asked was to submit the decree and as I couldn't wait for it to send it by mail.

X Q. 865. Was it not a fact that you were told that Saxlehner had prevailed in his protest at the time?

A. I can't recollect whether I was told that or not.

X Q. 866. Did you not state so on your direct examination?

A. I may have stated it. All I did was simply to inform myself on the last decree.

X Q 867. Has your company assumed the defense of the suits in which testimony is here taken, namely, against the Siegel-Cooper Company, Gies & Marquet?

A. Yes, sir.

X Q. 868. Have you also assumed the defense of a similar suit against Seabury in the supreme court of New York State?

A. Yes.

X Q. 869. Did you, in November, 1896, cause a circular to be sent out to your customers in the trade of which I now show you a copy?

A. Yes, sir.

Complainant's counsel offers the circular referred to in evidence and the same is marked "Complainant's Exhibit Defendant's Guarantee Circular, March 3, 1898, J. A. S., ex'r."

X Q. 870. Have you brought your correspondence with Mattoni & Wille from the year 1894 here?

A. Yes, sir.

639 X. Q. 871. Did you not receive any letters from Mattoni & Wille in the month of December, 1894?

A. I don't know; I brought you all the letters I found in the file for 1894.

X Q. 872. When you made your investigation into the question

whether you could sell the water imported by you under the name Hunyadi Matyas in the United States of America, did you come across the trade-mark registration of Andreas Saxlehner of the name Hunyadi in the United States Patent Office in the year 1887?

A. I did not investigate the applications in the Patent Office; my investigation was appertaining to what history the Hunyadi waters had here, the Matyas as well as the Arpad and the Janos, and the litigation that had preceded it.

X Q. 873. Did you take the trouble to find out how long Saxlehner's red and blue label had been on sale here in the United States of America?

A. I don't know whether I went to any trouble to find that out as my investigation showed——

X Q. 874. No, don't say "as;" we don't want any such testimony; the question is did you take any trouble?

A. I presume I may have inquired into it; I don't know now.

X Q. 875. Did you not ascertain at that time in 1890, that Saxlehner's water had been imported into this country since 1876 by the Apollinaris Company under a red and blue label divided into three panels with a medallion made in the red center panel, the words "Hunyadi Janos" prominently on the label and descriptive texts on the right and left panels?

A. I don't know whether I found that they were imported since 1876 in that way. I did find out that the Hunyadi Janos was imported by a label of the Apollinaris Company in red and blue and by Scherer by a label with red and white.

X Q. 876. That red and white label you had known from Europe, had you not?

A. I don't know what year you refer to.

X Q. 877. I mean in 1889, when you made these investi-
640 gations?

A. Yes, in 1889 I knew that label in Europe.

X Q. 878. Saxlehner's red and white label in Europe?

A. Yes, sir.

X Q. 879. And you knew his red and blue label here in America?

A. In 1889; yes, sir.

X Q. 880. And you found out during those investigations that this label had been imported by the Apollinaris Company since 1876 or thereabouts?

A. I did not find out that.

X Q. 881. Did you make any inquiries?

A. I don't think I made inquiries how long it had been imported under that label. I knew it was on the market, and I knew it was on the market also in a red and white label either at that time or shortly before that time.

X Q. 882. Did you ascertain in 1890 that this red and blue label of Saxlehner's water, as imported into this country by the Apollinaris Company had also been registered in Budapest in the trade-mark office of the chamber of commerce and industry?

A. I did not.

X Q. 883. Your investigation was not so much directed to the

question who was the first user of the red and blue label as to whether you could safely use a label which had red and blue colors, a tripartite division and a name of which Hunyadi was a part, similar to the label used for Saxlehner's water in this country, was it not?

A. It was not.

X Q. 884. Do you mean to say that you tried at that time to investigate who was the first user of this label in this country?

A. I simply investigated the status of the market at that time here and what litigation had preceded it.

X Q. 885. Please answer the question I asked you, whether you tried to investigate at that time who was the first user of that label here?

A. I can't tell what I may have investigated at that time in detail, but in general substance I have stated it.

X Q. 886. You have always known, have you not, that the
641 first user of a trade-mark or label is protected in this country by principles of the common law against imitations of his label and trade-mark by similar devices?

A. Not in all instances.

X Q. 887. Have you known the general principle?

A. Unless the device or label or coloring is common to a general class of goods.

X Q. 888. That doesn't answer my question. My question is, are you acquainted with the general principle that the first user of a trade-mark or label is protected in this country by principles well understood and applied against imitations of his label or trade-mark?

A. In 1890, the time we were talking about?

X Q. 889. Yes?

A. I was not familiar with the general trade-mark law at the time.

X Q. 890. Had you not yourself at that time already instituted complaints on trade-marks, litigations on trade-marks?

A. We had at that time one litigation, I believe, pending.

X Q. 891. Let me refresh your recollection. Had you not several litigations, which at that time you had not only commenced, but successfully carried through on behalf of your own company and the city of Carlsbad, in which you maintained that by reason of the first adoption of the name Carlsbad you and your principals abroad should be protected against imitations?

A. That is the litigation I referred to that we had at that time one pending.

X Q. 892. Had you not several such litigations against imitators of Carlsbad salt in which you were successful?

A. Since that time, yes.

X Q. 893. Had you not litigations before that time in which you were successful?

A. I can't recall now.

X Q. 894. Let me refresh your memory. Don't you recollect that in the year 1888 you brought a suit against Carl H. Schulz of

this city in which you tried to get an injunction preventing him from selling what you called an imitation of Carlsbad water, in which complaint you alleged the obtaining of two similar
642 injunctions in this country against other imitators?

A. I stated that I cannot recollect a single instance, but there may have been one or two people we have stopped from committing a gross fraud and putting a spurious, artificial article up as the genuine article.

X Q. 895. You call that a gross fraud, putting up a spurious article for a genuine?

A. Putting up a spurious, artificial article and selling it as a natural product I think would be considered a gross fraud.

X Q. 896. Do you not call it a gross fraud to sell one natural product for another natural product by means of similar labels or do you make a distinction there?

A. I don't understand your question. To sell one thing for another would certainly be wrong.

X Q. 897. It would be a fraud, would it not, if it was intentional?

A. Yes, one thing for another.

X Q. 898. That has always been your position when you were a complainant, has it not?

A. Yes, sir.

X Q. 899. And you have been frequently the complainant in similar suits?

A. Yes, sir.

X Q. 900. Now, being a defendant here do you think it is any different and the principle should not *to* be true?

A. This principle should positively be true.

X Q. 901. Did you not find in your investigations in 1888 that the Hunyadi Janos water had been on the market here for a long number of years and had been commonly sold and purchased by the name of Hunyadi water?

A. I did not find so.

X Q. 902. You did not find that?

A. No, sir.

X Q. 903. You mean that you investigated the fact whether Saxlehner's water had been on the market for a long number of years and had been sold by the name of Hunyadi water and you found that it was not a fact; is that what you mean to say?

A. I found that various Hunyadis were on the market that were selling either as Hunyadi Janos or Hunyadi Arpad or Hunyadi Laszlo.

X Q. 904. That doesn't answer my question; please answer my question. Did you try to ascertain whether the Hunyadi
643 Janos water had been sold in this country prior to 1889 and going back for a period until 1876, under the name of Hunyadi water and that there was a demand for Hunyadi water existing in this country at that time created by the Hunyadi Janos water?

Mr. COE: Objected to as irrelevant and immaterial.

A. I didn't find so.

X Q. 905. You mean, then, that even previous to the first importation of Hunyadi Arpad water in the years 1887 or 1888 or 1886, whatever it may be, the Hunyadi Janos water in this country was not sold as Hunyadi water?

A. As I stated previously I paid no attention before the year 1886.

X Q. 906. Why didn't you pay any attention to that, knowing that the first user of a label and trade-mark is protected by principles of fair trade in this country?

Objected to as immaterial and irrelevant.

A. Because I found in 1889 that there were various waters of the general name Hunyadi on the market.

X Q. 907. You have known also that there have been various articles sold as vaseline which were not made by the original makers of vaseline, have you not?

Mr. COE: Objected to as immaterial and irrelevant.

A. I don't know anything about vaseline.

X Q. 908. You have known, have you not, that there are always imitations upon the market of goods for which a large reputation has been established?

Mr. COE: Same objection.

A. More or less so.

644 X Q. 909. Your experience as a dealer in drugs makes you specially familiar with that, does it not?

Mr. COE: Same objection.

A. In some instances.

X Q. 910. Now, you mean to say that, finding that there were such imitations on the market, that justified you in your moral sense in doing the same thing and coming into this trade with another water also with a similar label, also with a name similar, and having the name Hunyadi as a part, and selling that in this country?

Mr. COE: Objected to as incompetent, irrelevant and immaterial, argumentative and hypothetical.

A. I have stated exactly what I found, and had the litigation that had preceded it to base my opinion on, and I did not go any further.

X Q. 911. You have stated that the reason why you adopted a label in the blue and brownish red, as adopted by you for Hunyadi Matyas was that you wanted to obtain an exclusive right for that label. Why did you not adopt such a label also for the Hunyadi Laszlo water for which you obtained the agency thereafter in addition?

A. Because we had a lease of many years on the Hunyadi Matyas, we intended to push this article and expend money thereon, and

we wanted a distinctive difference between that water and the others. The general way in which Hunyadi or many Hungarian bitter waters were on the market was under blue and red, and the trade recognized by a label of that sort that the waters came from Hungary and were bitter waters.

X Q. 912. That doesn't answer my question. Why did you not adopt for Hunyadi Laszlo a label for which you could also make separate proprietary claims?

Mr. COE: Objected to as immaterial and irrelevant, and as already answered.

645 A. We virtually took the sale of Hunyadi Laszlo only to please the Vichy people who were the main owners of that water, and as we were still agents for the Vichy at the same time we made a few importations simply to please them.

X Q. 913. Now, Mr. Eisner, you knew in 1889 who were the representatives of parties selling the Hunyadi Janos water in this country, did you not?

A. Yes.

X Q. 913½. They were right in the same city with you, were they not?

A. Yes, sir.

X Q. 914. Were you personally acquainted with them?

A. Not at that time.

X Q. 915. But you knew their business well?

A. Yes, sir.

X Q. 916. It would have been easy for you to go there and inquire when they had first imported the water with this particular blue and red label, would it not?

Mr. COE: Objected to as immaterial and irrelevant.

A. It would have been easy, certainly.

X Q. 917. But you didn't go, and didn't inquire?

Mr. COE: Same objection.

A. I had no purpose.

X Q. 918. Well, you didn't go?

A. No; but we had seen their principals in 1889 or 1890.

X Q. 919. What do you mean by that?

A. The Apollinaris Company, Limited.

X Q. 920. You had seen them?

A. Not I, personally; somebody of my firm.

X Q. 921. Will you please produce the water-analysis book which you mentioned yesterday?

A. I herewith produce the book (producing book).

X Q. 922. In this book of the year 1885, which you have produced, I find an analysis given of a spring called Hunyadi Matyas, which I understand to be the following?

646	Chlornatrium	9.819
	Schwefelsaures kali	0.255
	" matron	164.772
	" magnesia	101.417
	" kalk	4.705
	Doppeltkohlens elk	8.866
	" eisenoxydul	1.207
	Kieselsäure	0.052

Can you tell us what these ingredients mean in English, beginning with the first, chlornatrium?

Answer:

Chloride of sodium	9.819
Sulphate of potassium	0.255
Sulphate of sodium	164.772
Sulphate of magnesium	101.417
Sulphate of calcium	4.705
Bicarbonate of calcium	8.866
Bicarbonate of iron hyperoxide	1.207
Salicylic acid	0.052

X Q. 923. Do you know what the meaning of the analysis which is set forth in the column adjacent on the right to this is?

A. The column next on the right is an indication to mineral-water manufacturers what ingredients to use and what percentage in order to make an artificial water nearly representing the chemical constituents of the natural water.

X Q. 924. How long has this book been in your possession?

A. I can't tell exactly, some years.

X Q. 925. Don't you know when you purchased it?

A. Probably some time in 1889 or 1890; I can't exactly tell.

X Q. 926. Have you no recollection of its purchase?

A. I think I ordered it abroad, but I do not distinctly recollect anything about it.

X Q. 927. Did you ever compare this analysis with the analysis which is on your bottles of Hunyadi Matyas water; I mean that coming from the spring No. 2?

A. I paid no attention to the analysis of the Hunyadi Matyas in this book because the analysis of the Matyas which we im-
647 ported was on the bottle, and I had that to go by. I only used this book for the analysis of the Hunyadi Arpad and Janos, as the analysis of the Hunyadi Janos was not given on the bottle.

X Q. 928. Did you not see at a glance that this analysis of the Hunyadi Matyas water was totally different from the analysis on your bottles?

A. I noticed that and I thought it was an analysis that was probably not correct. I also noticed that there were two analyses of the Janos given distinctly different from each other.

X Q. 929. You mean one for the natural water and one for the water as it is proposed to manufacture it?

A. No, sir; I mean the analysis made in accordance with this book by Bunsen in 1876 of Janos spring No. —, and by Fresenius in 1878 of Janos spring No. 12; there are two distinct analyses as to the proportions of the various chemical ingredients.

X Q. 930. I suppose you don't mean as to the proportions of the various ingredients, but rather as to the quantities of the various ingredients found. Do you not find, by looking at those analyses closer that they are substantially the same, with the exception that one is a water containing more of each ingredient, but substantially in the same proportion as the other?

A. No, sir.

X Q. 931. Then please read what the analysis of each is.

Answer:

	By Bunsen.	By Fresenius.
Chloride of sodium	17.048	14.241
Sulphate of potassium	1.206	1.329
Sulphate of sodium	231.913	196.621
Sulphate of magnesium	217.922	194.942
Sulphate of calcium	None	1.379
Sulphate of strontium	.259	None
Bicarbonate of magnesium	5.950	None
Bicarbonate of calcium	7.967	12.537
Bicarbonate of iron hyperoxide	0.006	0.028
Salicylic acid	0.106	0.112

648 Complainant's counsel offers in evidence a duly authenticated copy of the petition of Ignatius Markus above referred to, and a translation of the same, and the same are marked "Complainant's Exhibit Markus Petition, March 3, 1898, J. A. S., ex'r."

Complainant's counsel also offers in evidence a duly authenticated copy of the report of Dr. Francis Frenreisz, chief physician of Buda, upon said petition and a translation of the same, and the same are marked "Complainant's Exhibit Town Physician's Report, March 3, 1898, J. A. S., ex'r."

Complainant's counsel also offers in evidence a duly authenticated copy of the decision of the town council of Buda upon Markus's petition and a translation thereof, and the same are marked "Complainant's Exhibit Town Council Decision of 1872, March 3, 1898, J. A. S., ex'r."

Complainant's counsel also offers in evidence a duly authenticated copy of the decision of the Hungarian minister of agriculture, industry and commerce, dated June 9, 1873, and a translation thereof, and the same are marked "Complainant's Exhibit Decision of Minister of Agriculture, March 3, 1898, J. A. S., ex'r."

(Cross-examination closed.)

Redirect by Mr. COE:

Counsel for defendant produces in evidence the Budapest circular of February, 1876, signed in print Andreas Saxlehner, produced by the witness yesterday at the request of complainant's counsel, and

the same is marked "Defendant's Exhibit Saxlehner 1876 Notice March 3, 1898, J. A. S., ex'r."

Objected to by complainant's counsel as secondary evidence and incompetent.

649 R. D. Q. 932. Appended to said Saxlehner notice or circular is an English translation of the same; please state whether such translation is correct?

Mr. KNAUTH: Same objection.

A. Substantially correct.

Counsel for defendants offers said translation in evidence, and the same is marked Defendant's Exhibit Saxlehner 1876 Notice, English Translation, March 3, 1898, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

R. D. Q. 933. Please read such translation on the record?

Mr. KNAUTH: Same objection.

A. "Budapest, February, 1876. I beg to inform you that I have made over to the Apollinaris Company, Limited, 19 Regent street, London, the introduction of my Hunyadi Janos bitter water in England, her possessions and colonies, as well as in all transmarine countries, and have accordingly also granted them the exclusive sale in these countries. For this reason, and as for the countries mentioned other labels are in force, being also registered, I find myself obliged to most politely request you not to execute orders from the districts of the Apollinaris Company, but in your friends' interests, to send them to me, as otherwise, with the label with which you are familiar you have to expect objections. Most respectfully, Andreas Saxlehner."

Complainant's counsel gives notice that at the hearing he will move to strike out all the foregoing evidence with reference to the pretended notice of Andreas Saxlehner as not sufficiently proven and incompetent.

Counsel for defendants offers in evidence the six labels identified by the witness as in the possession of Mattoni and marked for identification Mattoni's 1879 Labels Nos. 1, 2, 3, 4 and 5,
650 number six being already in evidence, and the same are marked "Defendant's Exhibits Mattoni's 1889 Labels Nos. 1, 2, 3, 4, and 5, March 3, 1898, J. A. S., ex'r."

Mr. KNAUTH: Objected to as immaterial, irrelevant, and incompetent.

R. D. Q. 934. I observe on Defendant's Exhibit Hunyadi Matyas 1877 Trade-mark some words in the German language written on a white piece of paper pasted on the front of said exhibit. Did you receive this document, Defendant's Exhibit Hunyadi Matyas 1877 Trade-mark, with this white piece of paper so pasted thereon?

Mr. KNAUTH: Objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

R. D. Q. 935. Please translate into English what is stated on this white piece of paper so annexed or pasted to the said exhibit.

Mr. KNAUTH: Same objections.

A. "The copy and translation of the first registration our Hunyadi Matyas trade-mark of July 6, 1877, which has been newly registered on August 29, 1887."

R. D. Q. 936. I observe on Defendant's Exhibit Hunyadi Arpad Hungarian Trade-mark certain words in the German language written on a white piece of paper pasted on the front of said exhibit. Was this piece of paper on said exhibit when you received it?

Mr. KNAUTH: Same objections.

A. Yes, sir.

R. D. Q. 937. Please translate into English the words in German on said piece of paper so annexed to said exhibit.

Mr. KNAUTH: Same objections.

A. "Certification that Hunyadi Arpad was registered by Ignatz Ungar on November 3, 1880."

651 R. D. Q. 938. You have been asked on cross-examination with reference to a suit brought by the Eisner & Mendelson Company against the International Medicinal Mineral Water Company of Chicago, and stated substantially that you brought the suit as against a common fraud. Please state more particularly what you mean by the words "common fraud," and the state of facts upon which such suit was brought.

A. This International Medicinal Mineral Water Company of Chicago bought up empty Hunyadi Matyas bottles and filled the same with an artificially prepared water which was nothing but a solution of Epsom salts, and they sold it under the label of "Hunyadi Sandor" as a genuine natural imported mineral water, and we considered this simply a common fraud and obtained a preliminary injunction against them on that ground, and they gave up the manufacture of this water and nothing has ever been heard of them since.

R. D. Q. 939. You were asked on cross-examination with reference to the words "Silver medal, Paris 1878, medal of merit Vienna, 1873 and silver medal Sydney, 1879" appearing on Complainant's Exhibit Royal Hungarian Bitter-water Bottle, and you stated that you have not those medals in your possession. These words were placed upon this bottle in reliance upon what Mr. Mattoni had informed you about them?

A. Yes, sir; what we had learned from Mattoni either verbally or through printed matter we received from him, labels, etc.

R. D. Q. 940. With reference to the contents of the bottles which you have sold under the 1890 lease, and as to the fact that they come from the Hunyadi Matyas spring as contracted for in said contract, and also with reference to the testimonials which you have used in advertising Hunyadi Matyas water, upon what have you relied?

A. Implicitly upon the statements by Mr. Heinrich Mattoni, t
owner of the firm of Mattoni & Wille, and upon the mater
652 in print furnished us from which we have copied said te
monials and statements.

R. D. Q. 941. What reason have you had to rely upon Mr. M
toni with reference to all these matters and as to his carrying
the contract of 1890 in letter and spirit?

Mr. KNAUTH: Objected to as incompetent.

A. I have known Mr. Heinrich Mattoni by reputation from b
hood up. I have known him personally since 1878, and since 18
I have known him intimately. His reputation and standing in t
the mineral-water trade are the very best—none better anywhe
in the world. He is considered the merchant prince amongst m
eral-water dealers; he has been knighted by the Emperor of Austr
has been appointed purveyor to the court, and bears the very high
reputation in Austria and amongst mineral-water dealers all o
the world. I would take his statement under all conditions a
circumstances involving any amount.

R. D. Q. 942. You were asked yesterday with reference to t
little strip which states "Hungarian bitter water, bottled at Bu
pest," appearing as a separate strip on the bottle Complainan
Exhibit B, and appearing as a part of the main label on Compla
ant's Exhibit Defendant's Additional Strip, and also with refere
to the absence of such strip from Complainant's Exhibit Weeks
Potter Bottle No. 1, and as to the times when these minor chan
took place with reference to the labels on the bottles. Have y
refreshed your recollection and can you be more definite as — t
times when these minor changes took place?

A. I have looked over on my return to the office various bott
imported at various times and thereby refreshed my recollecti
The bottle marked Complainant's Exhibit Weeks & Potter Bot
was imported some time late in the fall of 1893 and I believe be
the label of which we complained about in reference to t
653 center color being more on a red than on a brown. T
label on the bottle marked Complainant's Exhibit B was
bottles thereafter imported in 1894, 1895, and up to some time
1898, when we started to label the bottles here. It may have be
up to 1897; I am not sure on that point when we commenced
label here. The main label on bottle Complainant's Exhibit
fendant's Additional Strip Bottle may have been among the l
importations from abroad. The label I now produce is the la
we have used since we commenced to label here. This label d
not show the Seal Brand strip which is put on every bottle a
which is exactly like the one on bottles previously put in eviden

MORITZ EISNER

Sworn to this 15th day of March, 1898.

JOHN A. SHIELDS, *Ex'r*

Counsel for defendant offers in evidence the label last produ

by the witness and it is marked "Defendant's Exhibit U. S. Printed Label, March 3, 1899, J. A. S., ex'r."

Examination closed.

Adjourned to Friday, March 4, 1898, at 2 p. m.

SAXLEHNER
vs.
EISNER.

NEW YORK, *March* 4, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

PAUL SCHERER, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. My name is Paul Scherer, age, 45; residence 309 49th street, Brooklyn; occupation dealer in mineral waters.

654 Q. 2. How long have you been a dealer in mineral waters and where?

A. I have been in the mineral-water business since 1875, in the city of New York.

Q. 3. When did you first know of Hunyadi Janos water being sold in the American market?

A. In the year 1873.

X Q. 4. Under what label was it sold at that time?

A. White and red label.

Q. 5. In the year 1876 was there any change in the label?

A. I don't know whether it was 1876, but at the time the Apollinaris Company took hold of the agency of the Hunyadi Janos they changed the label.

Q. 6. To what label?

A. Changed it to blue and red.

Q. 7. And you know of its being sold in the American market in the year 1883 by the Apollinaris Company, Limited, under the blue and red label?

A. Yes.

Q. 8. You have stated that as early as 1873 you knew of its sale in this country under the red and white label; look at the exhibit marked "Hunyadi Janos European Label" and state whether that is the label substantially that you mean as the red and white label?

A. I mean that as the red and white label, except the European label was printed in German and that in English, but the place was the same.

Q. 9. Then as I understand you, the red and white label you refer to is substantially like this Hunyadi Janos European label having a tripartite division, the middle red, with two white wings; am I correct?

A. Yes.

Q. 10. Did you yourself import in or about the year 1883 any Hunyadi Janos water, having on it this red and white label?

A. Yes, sir.

Q. 11. And you sold it here in the American market?

A. Yes, sir.

Q. 12. How long did you continue to sell it?

A. I continued to sell that water up to 1885; I think it was in the fall of 1885.

655 Q. 13. And you sold it in competition with the Apollinaris Company, Limited, Hunyadi Janos water which they were selling under their red and blue label?

A. Yes, sir.

Q. 14. Did the Apollinaris Company, Limited, take any proceedings in court against you to endeavor to stop your importation and sale of this Hunyadi Janos water under the red and white label?

A. Yes, sir.

Q. 15. How did those proceedings terminate?

A. They got an injunction and I finally made them vacate it; they lost their suit and the injunction was vacated.

Q. 16. That was in or about what year?

A. I think it was 1885 or 1886.

Q. 17. Did you take the advice of counsel as to whether or not you were justified in importing this Hunyadi Janos water under this red and white label and selling it in competition with the Apollinaris Company, Limited?

Mr. KNAUTH: Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. 18. Whose advice did you take?

Mr. KNAUTH: Same objection.

A. Mr. Coe's advice.

Q. 19. And practically the Apollinaris Company, Limited, only stopped you for a very short time selling this and thereafter the injunction was dissolved?

A. Yes, sir.

Q. 20. And you continued to sell freely this water in competition with the red and blue label?

A. With the red and blue label.

Q. 21. And this continued during the years 1887 and 1888?

A. Yes, sir; this continued during the years 1887 and 1888.

Q. 22. Do you know of a Hunyadi water called Hunyadi
656 Arpad being sold in competition with both the Hunyadi Janos under its red and white label and its red and blue label?

A. Yes, sir.

Q. 23. In the United States?

A. Yes, sir.

Q. 24. How early do you remember such Hunyadi Arpad being sold in competition with these two Hunyadi Janos waters?

A. As far as I know it was 1883, when the Hunyadi Arpad came into the market in the United States; 1882 or 1883.

Q. 25. Do you recollect whether, in the years 1886 and 1887, the Apollinaris Company, Limited, took proceedings in court to stop the sale of this Hunyadi Arpad water?

A. I do remember; yes, sir.

Q. 26. Did they obtain an injunction against the sale of this water during the years 1886 and 1887?

A. I know they got an injunction, but I don't remember just the time it was; I remember they got an injunction.

Q. 27. And for some time the Hunyadi Arpad was under such injunction?

A. Yes, sir.

Q. 28. Do you recollect whether or not such injunction was vacated or dissolved?

Mr. KNAUTH: Objected to as incompetent.

A. I do.

Q. 29. And you recollect as a fact that such injunction was dissolved, do you not?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 30. Now after such injunction was dissolved did you become the agent for the firm of Ignatz Ungar & Son or *his* representative in the United States, Joseph Ungar, for the sale of this Hunyadi Arpad water?

A. I did get the agency for New York city.

Q. 31. For what parties?

A. From M. J. S. Perrine of Philadelphia; they used to be the general agent for the United States.

Q. 32. And as I understand you Perrine & Company, after
657 the dissolution of this injunction of Hunyadi Arpad, became the general agents for the sale of such water in the United States?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Q. 33. And you became the agent for New York city under them?

Mr. KNAUTH: Same objection.

A. For New York State.

Q. 34. And as such agent do you recollect whether in the years 1888 or 1889, you sold such Hunyadi Arpad water?

A. Yes, sir.

Q. 35. Look at the bottle now shown you marked Defendant's Exhibit Hunyadi Arpad Bottle and say whether that *that* is the style of bottle, capsule and label under which the Hunyadi Arpad was sold by you in 1888, as agent in New York under Perrine & Co. for Ungar?

A. Well, it is exactly the bottle and label and style of capsule, except that Eisner & Mendelson's name was not on.

Q. 36. Look at the label now shown you marked Defendant's Exhibit Hunyadi Arpad 1887 Label, and state whether that is the label under which you sold the Hunyadi Arpad water?

A. Yes, sir.

Q. 37. When in 1888?

A. Yes, in 1888.

Q. 38. And this same label was the label which was used on the Hunyadi Arpad water when you first knew it in 1883?

A. Yes, sir.

By Mr. KNAUTH:

Q. 39. You mean the red and blue label?

A. Yes, sir.

By Mr. COE:

Q. 40. The Hunyadi Arpad in this country, commencing in the year 1883 and 1884, was always sold under the red and blue label was it?

A. Yes, sir.

Q. 41. You have stated that you were the agent in New
658 York city for the sale of this water in the year 1888; did you continue as such agent in the year 1889?

A. Yes, sir.

Q. 42. And you continued thereafter as such agent selling such water until when?

A. I think until 1892.

Q. 43. Then why did you give up such agency?

A. I sold out the mineral-water business then; I sold out to Eisner & Mendelson.

Q. 44. The Arpad agency?

A. Yes, the Arpad agency.

Q. 45. Then as I understand you, from the year 1888 until the year 1892, when Eisner & Mendelson succeeded you as agents for Ungar, you sold the Hunyadi Arpad water under the label marked Defendant's Exhibit Hunyadi Arpad 1887 Label, continuously?

A. Continuously; yes, sir.

Q. 46. And in large quantities?

Mr. KNAUTH: Objected to as incompetent.

A. In large quantities.

Q. 47. In or about the year 1888, did you also know of a water called the Hunyadi Bela water?

A. Yes, sir.

Q. 48. Look at the label now shown you marked "Defendant's Exhibit Hunyadi Bela Label," and state whether or not it is similar to the labels of Hunyadi Bela water which you say you were familiar with in the year 1888?

A. Yes, sir; that is the label under which we sold the Hunyadi Bela.

Q. 49. Did you personally sell such Hunyadi Bela water?
A. Yes, sir.
Q. 50. As agent for Ungar?
A. As agent for Ungar, yes, sir.
Q. 51. And at the same time that you were selling the Hunyadi Arpad water?

Mr. KNAUTH: Objected to as indefinite.

A. Yes, sir.
Q. 52. As I understand you, you first commenced to sell this Hunyadi Bela water as agent for Ungar in or about the year 1888 under this label?
659 A. No, I started in sooner. We sold that about the same time we took the Arpad agency; that was about 1883.
Q. 53. 1883?
A. Yes.
Q. 54. And you continued to sell that right along?
A. Right along with the Arpad.
Q. 55. Did you sell it while the Arpad was under the injunction I have spoken of in the years 1886 and 1887?
A. That I don't remember.
Q. 56. But you do remember that in or about the year 1888, when the Hunyadi Arpad injunction was dissolved, you became the agent for the sale of this water under Perrine?
A. Yes, sir.
Q. 57. And you sold it alongside the Hunyadi Arpad and in competition with the Hunyadi Janos water, did you not?
A. Yes, sir.
Q. 58. And the bottles which contained this Hunyadi Bela water which you say you sold in the year 1888 and previous to that time, were like the Hunyadi Arpad bottles that I have shown you?
A. Yes, sir.
Q. 58. With like capsules?
A. Yes, sir.
Q. 59. How long did you continue to sell this Hunyadi Bela water as agent under Perrine for Ungar?
A. Till I sold out my mineral-water business in 1892.
Q. 60. And did the Eisner & Mendelson Company succeed you as agents for the sale of such Hunyadi Bela water?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.
Q. 61. Do you know of any Hungarian bitter water called the Victoria water, and if so, how far back did you know such waters?
A. I knew of the Hungarian Victoria water since 1883.
Q. 62. Did you commence to sell such water at that time?
A. Yes, sir.
Q. 63. Look at the bottle now shown you marked "Defendant's Exhibit Victoria Bottle," and state whether the labels on the
660 bottles of Victoria water which you say you sold as far back as 1883 were like the labels on this bottle and whether the

bottles themselves were like the bottle now shown you and wheth
the capsules were the same as on the bottle now shown you?

A. Yes, that is the same bottle and label and capsule as we sol
the water under.

Defendant's counsel states on the record that the bottle shown th
witness and to which he has just testified is the bottle marked D
fendant's Exhibit Victoria Bottle.

Q. 64. How long did you continue to sell this Victoria wat
under the like red and blue labels and in like bottles provided wit
like capsules as said bottle Defendant's Exhibit Victoria Bottle?

A. Until 1892.

Q. 65. Why did you stop the sale at that time?

A. Because I sold out.

Q. 66. To whom?

A. Eisner & Mendelson.

Q. 67. That is, Eisner & Mendelson succeeded you as agents fo
Ungar?

A. Of the Victoria water; yes, sir.

Q. 68. This was one of the Ungar waters?

A. One of the Ungar waters.

Q. 69. Was this water sold continuously from the year 1883 up t
the year 1892, when Eisner & Mendelson succeeded you?

A. Yes, sir; it was sold continuously.

Q. 70. And during the time when the injunction was on the Hun
yadi Arpad?

A. It was sold at that time.

Q. 71. During that time when the Hunyadi Arpad injunction wa
in force?

A. Yes, sir.

Q. 72. Did you know of a mineral water called Rakoczy Gyorgy
water in the American market and sold in the United States, and
if so, when first did you know of such water and of its sale in the
United States?

A. I know of that water, yes; I sold a good deal of the water, bu
I don't know exactly the year when it came into the market. As
far as I remember it must have been about 1884 or 1885.

661 Q. 73. It was, as you think, about a year or two after the
Victoria water?

A. After the Victoria water came into the market.

Q. 74. And the Bela?

A. Yes, sir.

Q. 75. Commencing, then, as I understand you, about the year
1885, you sold such water in the market?

A. Yes, sir.

Q. 76. Look at the label now shown you marked Defendant's
Exhibit Rakoczy Gyorgy Label and state whether or not such label
is similar to the labels affixed to the bottles of Hunyadi or Rakoczy
Gyorgy which you first commenced to sell in or about the year 1885.

A. Yes, sir; that was the label that the water was sold under.

Q. 77. In what sort of bottles was such water contained?

A. The same bottles as the Hunyadi Janos or Hunyadi Arpad came in.

Q. 78. And the Hunyadi Bela?

A. Yes, sir.

Q. 79. And the Victoria?

A. Yes, sir.

Q. 80. How about the capsules?

A. The same style of capsules, color and everything.

Q. 81. The same style of capsules as the Hunyadi Janos?

A. Hunyadi Janos, Hunyadi Arpad or Hunyadi Bela.

Q. 82. And the Victoria?

A. Yes, sir.

Q. 83. Commencing in 1885, how long did you continue the sale in the United States of this Rakoczy Gyorgy water?

A. Up till 1892.

Q. 84. Until Eisner & Mendelson succeeded you in the Ungar agency?

A. Yes, sir.

Q. 85. This was one of the Ungar waters?

A. Yes, sir.

Q. 86. Do you recollect whether you sold this water while the Hunyadi Arpad injunction was in force?

A. I believe it was sold while the injunction was in force to the best of my knowledge.

Q. 87. But at any rate you recollect selling it under this red and blue label for some time after 1885?

A. Yes, sir.

Q. 88. And during the years 1888, 1889, 1890, 1891 and 1892?

A. Yes, sir.

662 Q. 89. Do you recollect, while you were selling the Hunyadi Arpad water under this red and blue label whether the water was advertised in any trade papers or medical journals?

A. Yes, sir.

Q. 90. Look at the advertisement now shown you marked "Hunyadi Arpad Advertisement No. 1," which appeared in the issue of December, 1888, of the Druggists' Circular and Chemical Gazette, and state whether that is one of the advertisements you refer to.

A. Yes, sir; this is one of the advertisements issued by Perrine of Philadelphia as agent for the United States.

Q. 91. And you know it was inserted by Perrine as agent for Ungar?

A. Yes, sir.

Q. 92. And it bears your name?

A. Yes, sir; it bears my name as agent for New York.

Q. 93. The name of the firm P. Scherer & Co.?

A. Yes, sir.

Q. 94. By the way, who was the company at that time?

A. Charles Moebus.

Q. 95. Do you recollect whether similar advertisements were inserted by the authority of Perrine as agents for Ungar and yourself

as agent under them for New York city similar to this advertisement Hunyadi Arpad No. 1?

Mr. KNAUTH: Objected to as incompetent.

A. I do, in some other papers.

Q. 96. And also in issues of this same Druggists' Circular and Chemical Gazette?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 97. In the year 1888?

A. I don't remember the year exactly, but I know it was issued.

Q. 98. As I understand you, this and similar advertisements were inserted in the years 1888 and 1889 in this and other trade papers and medical journal-?

Mr. KNAUTH: Same objection.

663 A. Yes, sir.

Q. 99. Look at the double-page Druggists' Circular Hunyadi Arpad advertisement shown you marked "Hunyadi Arpad Advertisement No. 2," showing a fac-simile of the Hunyadi Arpad label in its red and blue colors inserted in the Druggists' Circular of March, 1889, and state whether or not such advertisement was inserted by Perrine as agents for Ungar and by P. Scherer & Co. as agents under them for the Hunyadi Arpad water.

Mr. KNAUTH: Objected to as incompetent.

A. I remember that very well; yes, sir.

Q. 100. Were similar-colored advertisements with your knowledge inserted in said Druggists' Circular and other issues of the same?

Mr. KNAUTH: Objected to as incompetent.

A. Others, I don't know, but I remember the Druggists' Circular very well.

Q. 101. Then as I understand you this double-page colored circular you know was inserted in other issues of the Druggists' Circular in the same year or in the subsequent year, 1890?

Mr. KNAUTH: Same objection and as leading.

A. I don't remember the other papers, but I remember this Druggists' Circular.

Q. 102. I am confining my question to this Druggists' Circular.

A. I remember that very well, yes, sir.

Q. 103. And you remember that it was inserted in several issues of such Druggists' Circular?

A. Several issues; yes, sir.

Q. 104. In the years 1889 and 1890?

A. Yes, sir.

Q. 105. Look at the advertisement now shown you of July, 1890, of Hunyadi Arpad water in the Druggists' Circular and Chemical

Gazette of that month and marked "Defendant's Exhibit
664 Hunyadi Arpad Advertisement No. 3," and state whether or not you recollect such advertisement being inserted in such issue.

A. Yes, sir.

Q. 106. And such advertisement was inserted on the authority of Perrine & Co., as agents?

A. Yes, Perrine & Co.

Q. 107. Perrine & Co. as agents for Ungar and you as subagents in New York city under them?

A. Yes, sir.

Q. 108. State whether or not you know whether the Hunyadi Arpad was advertised during the years 1888, 1889, 1890 and 1891, while you were agent for such water in New York city in medical journals and trade papers during those years?

Mr. KNAUTH: Objected to as incompetent and as calling for secondary evidence.

A. Yes, sir.

Q. 109. What knowledge have you on the subject?

Mr. KNAUTH: Same objection.

A. Well, I know that we advertised pretty extensively in medical papers.

Q. 110. Did you attend to this advertising yourself?

Mr. KNAUTH: Same objection.

A. No.

Q. 111. Who did?

Mr. KNAUTH: Same objection.

A. Joseph Ungar.

Q. 112. Where was he?

A. He was in my office.

Q. 113. He was the representative in this country of Ignatz Ungar & Son, the owners of the springs?

A. Yes, sir.

Q. 114. Did he consult you with reference to the advertising during the years from 1888 till 1892?

Mr. KNAUTH: Objected to as immaterial and irrelevant and also as incompetent.

A. He did most of the time.

665 Q. 115. And from his presence in your office and from your general recollection and from his consultation with you you are able to state that the Hunyadi Arpad water was quite extensively advertised in medical journals during the years from 1888 till 1892, when Eisner & Mendelson succeeded you in the agency; am I correct?

Mr. KNAUTH: Objected to as incompetent and as strongly leading.

A. Yes, sir.

Q. 115. I call your attention to an advertisement inserted in the

Medical Record of June 8, 1889, of Hunyadi Arpad water; please state whether such advertisement was inserted by your authority?

A. Yes, sir.

Q. 116. Do you recollect whether or not similar advertisements to this were inserted in other issues of the Medical Record in the years 1889 and 1890?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Q. 117. Do you recollect whether between the years 1888 and 1892, when you were agents in New York city under Perrine for the Hunyadi Arpad water, you sent out advertising mailing slips of the Hunyadi Arpad water at any time?

A. Yes, sir.

Q. 118. To whom did you send such slips?

A. I sent them to the trade, the medical profession and consumers of mineral waters, of which we have the names on our books.

Q. 119. As a mode of increasing the sale of the Hunyadi Arpad water and making it known?

A. Yes, sir.

Q. 120. And of advertisement?

A. Yes, sir.

Q. 121. Look at the mailing slips now shown you and state whether they are similar to the mailing slips of Hunyadi Arpad water you have just referred to so sent out?

A. They are the same, except the ones we sent out had our name printed on here (indicating bottom of sheet) on the back of it.

666 The mailing slips produced by the witness are offered in evidence by defendant's counsel and are marked Defendant's Exhibit Scherer Hunyadi Arpad Mailing Slips Nos. 1 and 2, March 4, 1898, J. A. S., ex'r.

Q. 122. State whether or not between the years 1888 and 1892 the sales of the Hunyadi Arpad water were large.

Mr. KNAUTH: Objected to as incompetent.

A. They were very large, sir.

Q. 123. Do you recollect as to the sale of the Hunyadi Bela in those years, 1888, 1892?

Mr. KNAUTH: Same objection.

A. Well, we sold Hunyadi Bela not to such a large extent because we didn't want to run any competition against the Hunyadi Arpad.

Q. 124. But you sold it to a considerable extent?

Mr. KNAUTH: Same objection.

A. Yes, we sold it to a considerable extent.

Q. 125. Do you know of a Hunyadi water being sold in the United States called the Hunyadi Laszlo, and if so, when first did you know of its sale in the United States?

A. I know of Hunyadi Laszlo water; yes, sir.

Q. 126. When first did you know of it?

A. I bought that water from, I think, about the year 1885 or 1886.

Q. 127. Do you know of its sale after the years 1885 and 1886?

A. The water was sold by Bouche Fils.

Q. 128. They were the agents in 1885 when you first knew of the sale of the water?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Q. 129. Did you sell the water for them?

A. No, sir; I bought the water from them and sold it myself.

667 Q. 130. How long did you continue to do so commencing in the year 1885?

A. I continued to buy the water right along till after Eisner & Mendelson became the agents for it, and then I bought from them.

Q. 141. Do you recollect about the time when they became agents for such Hunyadi Laszlo water?

A. I do not remember exactly the year when they became agents for it.

Q. 132. Approximately?

A. Well, it must have been about 1890, I think.

Q. 133. Or later than that?

A. It may have been later; I can't remember.

Q. 134. But do you recollect that commencing with the year 1885 you bought the water from Bouche Fils, the agents for such water in the United States, and sold it until they were succeeded in their agency by Eisner & Mendelson, and then bought it of Eisner & Mendelson and sold it?

A. Yes, sir.

Q. 135. Do you recollect when you ceased to sell such Hunyadi Lazlo water?

A. I do not remember when I ceased to sell it.

Q. 136. Do you recollect whether or not it was some time after Eisner & Mendelson had become the agents?

A. It was after Eisner & Mendelson became the agents; yes, sir.

Q. 137. Look at the bottle now shown you and state whether it is Hunyadi Laszlo water which you say you first commenced to sell in 1885 and sold when both Bouche Fils and Eisner & Mendelson were agents for such water, and if it shows the labels, the bottles and the capsules under which such Hunyadi Laszlo was sold by you.

A. This is the labels and bottles and capsules in which the Laszlo water was sold which I bought from Bouche Fils or Eisner & Mendelson.

Defendant's counsel states that the bottle shown witness is marked "Complainant's Exhibit Hunyadi Laszlo Bottle."

668 Q. 138. Do you recollect seing in the year 1889 this or a similar advertisement in the Medical Record of April 6, 1889, marked Defendant's Exhibit Apollinaris Hunyadi Advertisement?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompe-nt.

A. I remember that; yes, sir.

Q. 139. You remember this advertisement?

A. Yes, sir.

Q. 140. Do you remember seeing similar advertisements in other issues of the Medical Record of any other paperss in the year 1889 or 1890?

Mr. KNAUTH: Same objection.

A. I do.

Q. 141. The advertisement I have shown you from the Medical Record bears date April 6, 1889. Please state what Hunyadi waters were in the market at that time to your knowledge?

A. There was on the market Hunyadi Janos, Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo.

Q. 142. Look at the advertisement now shown you marked Defendant's Exhibit Apollinaris Hunyadi Medical Record Advertisement, which appeared in the Medical Record of April 8, 1893, and state whether or not you remember such advertisement?

Mr. KNAUTH: Objected to as immaterial, irrelevant and incompetent.

A. Yes, I have seen that advertisement.

Q. 143. Do you recollect seeing this advertisement in any other papers than the Medical Record in the year 1893?

Mr. KNAUTH: Same objections.

A. I saw that in the daily newspapers.

Q. 144. In that year?

A. I don't remember the year, but I saw it in the daily papers.

Q. 145. And in trade journal papers?

Mr. KNAUTH: Same objections.

669 A. Trade journals, yes, sir.

Q. 146. Look at the postal card now shown you marked Defendant's Exhibit Apollinaris Hunyadi Postal Card No. 1, and state whether you recollect such postal cards being circulated and distributed by the Apollinaris Company in or about the year 1893?

Mr. KNAUTH: Same objection.

A. Yes, sir; I remember those postal cards.

Q. 147. Did you receive one?

Mr. KNAUTH: Same objections.

A. I did.

Q. 148. Now please state what Hunyadis were in the market in the United States at the time in 1893, when you saw such advertisements in the Medical Record and other papers and knew of the circulation and distribution of the Apollinaris postal cards you have referred to?

A. The Hunyadi Janos, the Hunyadi Arpad, the Hunyadi Bela, the Hunyadi Laszlo, the Hunyadi Miklos, the Hunyadi Alajos, the Hunyadi Matyas, the Hunyadi Lajos and I think one or two more but I don't recollect just the names.

Q. 149. Do you recollect a water called Hunyadi Joseph and if so, when was that on the market in the United States?

A. Hunyadi Joseph was put on the market about four or five years ago.

Q. 150. And you recollect of its being sold?

A. Yes, sir; I sold it myself.

Q. 151. Under what label and in what bottles and style of capsules was that sold?

A. The Hunyadi Joseph sold under a white and blue label first, and now it is sold under a white label with green and black print on.

Mr. KNAUTH: The answer is objected to as secondary and incompetent evidence.

Q. 152. During all the period that you speak of in your
670 examination commencing in the year 1883, who were the agents or sellers of the Hunyadi Janos water under its red and blue label?

Mr. KNAUTH: Objected to as calling for incompetent evidence with reference to the agency.

A. The Hunyadi Janos was first sold by Frederick de Bary & Company afterwards Charles Graef & Company.

Q. 153. And there two firms were the representatives in this country of the Apollinaris Company, Limited?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Q. 154. Did you have any dealings in the United States with the Apollinaris Company or any of its officials and if so, please state what dealings?

A. I had dealings with the Apollinaris Company, with their president. I think with Mr. Steinkopff.

Q. 155. When was this?

A. That was in the year 1887, I think.

Q. 156. Did he represent himself as the president of the Apollinaris Company and the Apollinaris Company as the sole and exclucive sellers in this country of the Hunyadi Janos water?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Q. 157. Please state how you came to see him at that time and where?

A. I was the only one that handled Hunyadi Janos water at that time and he came over to see me to see what he could do with me—what kind of a deal he could make with me to handle the water further under that new label.

Q. 158. And you had conversations with him about it?
A. Yes, sir.
Q. 159. Where?
A. In my office.
Q. 160. Where was that then?
A. 72 and 74 Park place.
671 Q. 161. What did he state to you with reference to his au
thority as representing the Apollinaris Company, Limite
and as to such company having authority to sell the Hunyadi Jano
water?

Mr. KNAUTH: Objected to as incompetent.

A. He told me that the Apollinaris Company was the agent fo
Saxlehner for all the transmarine countries, I think, except Europ
and that I would have to buy the water from him hereafter.
Q. 162. Did you have later another conversation with him som
time in the eighties, and if so, with reference to what?

Mr. KNAUTH: Objected to as incompetent.

A. I had a conversation with him, yes; he induced me to stop im
porting the Hunyadi Janos water under the red and white label an
finally we had an agreement together by which he gave me a
extra discount and I agreed to discontinue to import it.
Q. 163. At this conversation did he represent himself as president
the Apollinaris Company, Limited, and as having authority on th
part of such company to treat with you with reference to Hunyad
Janos water?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.
Q. 164. And did he represent such company at that time as th
agent of the owner of the Hunyadi spring Andreas Saxlehner?

Mr. KNAUTH: Objected to as incompetent, and the attention o
the court is called to the persistent attempt of defendants' counse
to prove the fact of agency by incompetent and secondary evidenc

A. Yes, sir.

Counsel for defendants disclaims any such intention, bu
672 states that he has a perfect right to ask the witness as to co
versations and representations of the present president of th
Apollinaris Company with reference to dealings with Hunyad
Janos water and as to what representations were made by such pres
dent at that time as to the authority of the Apollinaris Company t
have dealings with him with reference to Hunyadi Janos water.
Complainant's counsel states in reply that the question is no
whether the Apollinaris Company is bound by any statements whic
its president Mr. Steinkopff may have made to others, but whethe
this complainant is bound by statements of Mr. Steinkopff or an
official of the Apollinaris Company, and on that point the testimon
is clearly irrelevant and incompetent.
Defendant's counsel in reply, states that he has a right to hav

the witness state what conversations he had with Mr. Steinkopff and that such conversations must bear materially upon the authority on the part of the Apollinaris Company with reference to Hunyadi Janos water.

Q. 165. Can you state at or about what time in the eighties, if you recollect, this conversation occurred with Mr. Steinkopff?

Mr. KNAUTH: Objected to as incompetent, immaterial and irrelevant.

A. I don't remember exactly the month in which it happened.
Q. 166. How about the year?
A. Well, the first conversation was in 1877.
Q. 167. I have got that; I am speaking about the eighties.
A. I can't exactly remember the year; it may have been 1880 or 1881.
Q. 168. Was it previous to the suit which the Apollinaris Company, Limited, brought against you to restrain the sale of Hunyadi Janos water under its red and white label?
A. Yes, sir.
673 Q. 169. Where did this conversation last referred to take place, in the eighties?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. In the office of Frederick de Bary & Company.
Q. 170. Where was their office then?
A. In Warren street.
Q. 171. Did you afterwards have any litigation or trouble as to the importation of this Hunyadi Janos water after you had made the arrangement with the president of the Apollinaris Company which you have spoken of, and if so, under what circumstances?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. Yes, sir; I imported the red and white label Hunyadi Janos water quite extensively and Mr. Steinkopff tried to prevent me and stop me from importing it. As he could not do it, he went and took out an injunction against the white and red label which was afterwards vacated.
Q. 172. And these proceedings which he took against you were the ones that you have previously referred to in your testimony today, were they not?
A. Yes, sir.
Q. 173. Look at the paper now shown you marked Defendant's Exhibit Saxlehner 1876 Notice, and state what you know about it.
A. This notice was given to me by my lawyer in London in that suit which I had with the Apollinaris Company regarding a lot of water they attached in Hull from me, and this was given as an exhibit in that lawsuit.
Q. 174. Was this an English lawsuit?
A. An English lawsuit; yes, sir.
Q. 175. You state that this paper was an exhibit in that suit, what was that suit?

Mr. KNAUTH: Objected to as incompetent.

674 A. This lawsuit was brought by the Apollinaris Company to keep these goods; there were 1,200 cases of Hunyadi water which were attached in Hull; they wanted to keep them or destroy them, or I don't know what they wanted.

Q. 176. And as I understand you this paper was produced in that suit as an exhibit?

Mr. KNAUTH: Same objection, and the question is further objected to for the reason that the paper produced and shown to witness does not bear any exhibit mark in the English litigation.

A. As an exhibit; yes, sir.

Q. 177. What does the slip marked No. 1 mean on such paper, if you know?

Mr. KNAUTH: Objected to as incompetent.

A. No. 1.

Q. 178. Does the No. 1 on that paper refer to the number of the exhibit?

Mr. KNAUTH: Objected to as incompetent.

A. I think so.

Q. 179. Do you recollect with reference to that lawsuit whether your lawyer asked the Apollinaris Company, Limited, to produce their authority for bringing that suit?

Mr. KNAUTH: Objected to as incompetent and calling for secondary evidence.

A. I do not recollect that, but it seems to me they must have asked that authority.

Q. 180. When did you receive this paper from your lawyer?

Mr. KNAUTH: Same objection.

A. I received that paper in about 1886 or 1887.

Q. 181. For how long was it in your possession from the time you received it?

Mr. KNAUTH: Same objection.

675 A. It was in my possession a couple of years; two or three years.

Q. 182. What became of such paper then?

Mr. KNAUTH: Same objection.

A. I handed it over to Mr. Eisner.

Q. 183. Is this paper in the same condition now as when you received it in the year 1887, as you say?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 184. With the exception of the written words "Defendant's Exhibit Saxlehner 1876 Notice, March 3, 1898, J. A. S., ex'r"?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 185. Was the translation of such paper appended to the same as shown?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 186. And the white piece of paper marked with the figure number one?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Q. 187. Under what circumstances in the year 1887 did your English lawyer give you this paper, or in what connection?

Mr. KNAUTH: Same objection.

A. The suit was compromised and all the papers relating to the suit were sent back to me.

Q. 188. And that is the way you came to have it in your possession?

Mr. KNAUTH: Same objection.

A. Yes, sir.

676 Q. 189. While you sold the Hunyadi Bela and Hunyadi Arpad and Laszlo waters, as you say, did you sell at retail as well as wholesale?

A. I did.

Q. 190. Under what term were these waters and *and* the other Hunyadi waters you have spoken of called for?

A. They were called for under different names; some called for Hunyadi water simply, but generally they called for Hungarian water.

Q. 191. And all these waters were called for by the alternative names of Hunyadi and Hungarian bitter water, were they?

A. Yes, sir; Hunyadi and Hungarian bitter water.

Q. 192. When you were selling at retail and a customer came in and called for Hunyadi water, what did you give him?

A. Gave him whatever we had on hand.

Q. 193. During the years from 1888 up to the present time, from your long experience as a mineral-water dealer both at wholesale and retail, can you state whether or not the word Hunyadi has been used as a generic term to designate Hungarian bitter waters?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

Cross-examined by Mr. KNAUTH:

X Q. 194. Previous to 1892 what did you give to a customer who called for Hunyadi water?

A. We gave him the Hunyadi Janos.

X Q. 195. When a customer came to your store previous to 1882

and wanted a bottle of Hunyadi, did you give him a bottle of Hunyadi Janos with red and blue label or with red and white label?

A. With red and white label.

X Q. 196. Did you keep that in stock continuously?

A. I kept it in stock right along; yes, sir.

X Q. 197. Then you had kept it in stock how long before that?

A. Before that, since 1877, when I started importing.

X Q. 198. Did you not say that you started in business in 1875?

A. I did.

677 X Q. 199. Did you at once keep the Hunyadi Janos among the waters which you sold?

A. No, I didn't keep it at once because the water was only introduced about 1876.

X Q. 200. You mean under the red and white label?

A. Yes; when I started business there was no Hunyadi Janos sold; it was only sold later.

X Q. 201. But you have stated that you knew the Hunyadi Janos in white and red label since the year 1873?

A. Yes; I knew it from Europe; I knew it from a party I used to work with who had a case here, but they never sold it.

X Q. 202. Where was that; what were you doing at that time?

A. It was at John Sattig's, 200 Broadway.

X Q. 203. When did you go into his employ?

A. In the year 1872.

X Q. 204. And you say that he had some Hunyadi Janos water on sale?

A. Yes, sir.

X Q. 205. With red and white labels?

A. Yes, sir.

X Q. 206. Do you remember whether in these years 1872 to 1875, this Hunyadi Janos water was sold under those red and white labels by others in this city?

A. Yes, sir.

X Q. 207. By whom?

A. Schultheiss & Mantzing.

X Q. 208. Were they mineral-water dealers?

A. Yes, sir.

X Q. 209. Did you ever buy any at the store of Amend, the druggist in Third avenue?

A. No.

X Q. 210. Do you know under what name the water was demanded before you took hold of it in 1877?

A. Well, as far as I remember they called it Hunyadi water.

X Q. 211. Was that the common or ordinary way in which the water was called until 1882?

A. Some called it Hunyadi and some called it Hungarian water.

X Q. 212. Can you state how much of the Hunyadi Janos water with red and white labels you sold between the years 1878 and 1882?

678 A. I must have sold several thousand cases; I don't remember how much, but I know it is quite a good deal.

X Q. 213. Several thousand cases?

A. Yes.

X Q. 214. Can you state approximately how many thousand?

A. I may have sold probably 2,000 cases.

X Q. 215. Were you at that time the only man who sold Hunyadi Janos water with the red and white label here in competition with the red and blue label water of the Apollinaris Company?

A. Yes, sir.

X Q. 216. It was not imported by anybody else?

A. Except Schulteiss & Mantzing; they used to be the agents before the Apollinaris Company were the agents here.

X Q. 217. Do you know whether Schulteiss & Mantzing continued to import the Hunyadi Janos water with red and white labels after 1877?

A. No, sir; Schulteiss & Mantzing went out of business about the year 1880, I think it was.

X Q. 218. You said that you had known the Hunyadi Janos water in Europe; was that previous to 1873?

A. No; it was not previous; I have known it from advertisements in European papers and I saw it here when I used to clerk for John Sattig, he used to have a case there for almost two years.

X Q. 218. Was the Hunyadi Janos water largely advertised in this country?

A. It was largely advertised when the Apollinaris Company took hold of it.

X Q. 219. Advertised in the daily papers?

A. The daily papers; yes, sir.

X Q. 220. Do you know in what daily papers it was advertised?

A. Oh, it was advertised in most all of them.

X Q. 221. You mean advertised right along daily or weekly?

A. I couldn't say whether it was daily, but it was heavily advertised—very largely advertised.

X Q. 222. Do you know which bitter water at that time was advertised most in the daily papers?

679 A. In competition with the Hunyadi Janos, Frederichshall bitter was advertised.

X Q. 223. Do you know whether the Hunyadi Janos or the Friederichshall was advertised the most?

A. To the best of my recollection and knowledge I think Hunyadi Janos was advertised more.

X Q. 224. And that commonly went by the name Hunyadi water at that time?

A. Hunyadi; yes, sir; Hunyadi and Hungarian bitter water, both.

X Q. 225. Did you know until 1882 or 1883 any Hungarian bitter water besides the Hunyadi Janos water which was sold under a red and blue label like that of the Hunyadi Janos?

A. Yes, sir.

X Q. 226. What other water?

A. Ofner Rakoczy and Franz Joseph; under red and white labels you mean?

X Q. 227. No; I was asking under a red and blue label until 1882?

A. The Ofner Rakoczy was under a blue and white, I think. I will say I don't remember any water being sold under a red and blue label.

X Q. 228. Not until 1882?

A. 1882.

X Q. 229. Did you see this Hunyadi Janos water under the red and blue label exhibited in the drug store and places where such waters are usually sold from 1877 to 1882?

A. Yes, sir.

X Q. 230. It was a familiar commodity, was it not?

A. Yes; everybody knew the water.

X Q. 231. Was there a large demand for it?

A. Oh, yes; a large demand for it.

X Q. 232. You have stated something about a water called Victoria water. When did you first get that water?

A. We got that the same time we took the Arpad agency; I believe it was 1883.

X Q. 233. Under what name was that water sold?

A. Under Victoria; Hungarian Victoria bitter water or something of that kind.

X Q. 234. That was the name which was on the label, Victoria?

A. Victoria; yes, sir.

X Q. 235. And at the same time you also kept in stock the Hunyadi Janos water and also the Hunyadi Arpad which then
680 had come in?

A. Yes, sir.

X Q. 236. Now, if a man in 1883 came to your store and demanded a bottle of Hunyadi water, what did you hand to him?

A. I handed him then the Arpad.

X Q. 237. Why did you not then give him the Janos?

A. Because I was the agent for the Arpad and consequently it was to my interest to push that water.

X Q. 238. Did you make more profit out of the Arpad water than out of the Janos?

A. Yes, sir.

X Q. 239. You wouldn't give him Victoria water when he asked for Hunyadi in 1883?

A. No, sir.

X Q. 240. How was the Victoria demanded?

A. There was very little Victoria water called for. If anybody wanted Victoria, they called for Victoria water.

X Q. 241. There was very little demand then for Victoria?

A. Yes, sir.

X Q. 242. Was it ever sold in large quantities—the Victoria?

A. No, not in large quantities.

X Q. 243. Did you ever advertise the Victoria in daily papers?

A. No, sir.

X Q. 244. You also have stated that you obtained a water called Rakoczy Gyorgy. Was that right?

A. Yes, sir.

X Q. 245. About the year 1884 or 1885?

A. Yes, sir.

X Q. 246. Under what name was that water sold?

A. Ofner Rakoczy.

X Q. 247. In 1884 or 1885 you had then in stock the Hunyadi Janos, the Hunyadi Arpad, the Victoria and the Ofner Rakoczy; in that year when a man demanded Hunyadi water, what did you give him?

A. Hunyadi Arpad.

X Q. 248. Has that been invariably your custom to give out Hunyadi Arpad whenever Hunyadi was called for after you obtained the Arpad?

A. Yes, sir.

X Q. 249. Before that you gave out Hunyadi Janos?

A. Before I had the Arpad I gave out Hunyadi Janos; yes, sir.

681 X Q. 250. Why was the Rakoczy Gyorgy not called Hunyadi water?

A. I do not know.

X Q. 251. Was it the reason that the name Hunyadi was not on the label?

A. I do not know why it was not called Hunyadi Rakoczy; I couldn't tell you.

X Q. 251½. The fact is, I suppose, that Rakoczy Gyorgy was not called a Hunyadi water?

A. It was not called a Hunyadi water; yes, sir.

X Q. 252. Did you advertise the Rackoczy Gyorgy?

A. No, sir.

X Q. 253. Did you never advertise it?

A. I never advertised it.

X Q. 254. How much of it did you sell?

A. We must have sold a couple of hundred cases a year; two or three hundred cases a year.

X Q. 255. Did its sale always remain small?

A. Always remained small; yes, sir.

X Q. 256. I mean small as compared with the Hunyadi Janos or Hunyadi Arpad?

A. Yes, sir.

X Q. 257. How many bottles were there in a case?

A. Fifty bottles.

X Q. 258. Was that the case with all the different waters?

A. Yes, sir.

X Q. 259. They were sold uniformly in the same kind of cases?

A. The same kind of bottles.

X Q. 260. Are you not mistaken with reference to the first time when you purchased Hunyadi Laszlo water here, please try to recollect as exactly as you can the first year when you purchased Hunyadi Laszlo?

A. I cannot recollect that exact year.

X Q. 261. May it have been as late as 1889 or 1890?

A. I couldn't remember the time exactly; it was between 1886 and 1890, I know that.

X Q. 262. Between 1886 and 1890?

A. Yes, sir.

X Q. 263. But you can't place it within that period?

A. I cannot, except I refer to my books. I couldn't tell you now from memory.

X Q. 264. In answer to the question what Hunyadi waters you knew in 1889 and also in 1893, you have named a number
682 of waters which have the name Hunyadi as part of the title; have you ever known any other Hunyadi waters except those that were called Hunyadi in the name of a spring or water?

A. Those which I named I recollect; there may have been some more on the market which I do not recollect now.

X Q. 265. You do not quite understand my question. Take, for instance, water known as Hungaria, do you call that a Hunyadi water?

A. No, sir.

X Q. 266. How do you sell that, under what name?

A. As Hungaria water.

X Q. 267. That has the name Hungaria on the label, has it not?

A. Yes, sir.

X Q. 268. And you call it Hungaria?

A. Call it Hungaria; yes, sir.

X Q. 269. How does the public demand it?

A. Hungaria water.

X Q. 270. You wouldn't give that water out if a person came to you and asked for Hunyadi water?

A. No, sir.

X Q. 271. You are always guided by the name which appears on the label as the name of the water, are you not?

A. Yes, sir.

X Q. 272. That has been invariably your custom?

A. Invariably my custom; yes, sir.

X Q. 273. Will you please state of whom you obtained the Hunyadi Janos water with the red and white label?

A. The first Hunyadi Janos water I obtained from their agents, Schulteiss & Mantzing.

X Q. 274. When was that?

A. That was in the year 1876 and 1877 and 1878, maybe.

X Q. 275. Do you know that the Apollinaris Company obtained an exclusive sale of the Hunyadi Janos water in 1876?

A. I do know; yes, sir.

X Q. 276. Was it not previous to 1876 that you obtained this red and white label from Schultheiss & Mantzing?

A. Yes, sir; it was when I went in business. I went in
683 business in February, 1875, and I sold water before I went in business for Schultheiss & Mantzing on commission.

X Q. 277. You mean Hunyadi Janos water?

A. Yes, sir.

X Q. 278. Such water you purchased from Schultheiss & Mantzing was previous to 1875?

A. Yes, sir.

X Q. 279. After 1876 where did you obtain the Hunyadi Janos water which had the red and white label on?

A. I bought that in Germany.

X Q. 280. Of what party?

A. I bought it from Stoevensand & Son; I bought it from Heil of Berlin, and the most of it my forwarding agents bought for me in the open market. Where they bought it I do not know.

X Q. 281. You bought it in the open market, did you?

A. My agents in Europe bought it in the open market.

X Q. 282. What you bought you also bought in the same manner from dealers?

A. I bought a few lots from certain parties which I don't remember, and my forwarding agents bought it in the open market in Europe.

X Q. 283. Didn't that water contain a caution on the red and white label printed by Saxlehner to the effect that the water should not be exported?

A. I believe it did.

X Q. 284. Is it not a fact that in the suit which the Apollinaris Company brought here against you the court decided that nobody could be prevented from buying in the open market this water of Saxlehner in Europe and exporting it into this country?

A. I don't remember what the court decided. I know the injunction was vacated; that is all I know.

X Q. 285. Are you not also selling a water which is labeled with the name Loser Janos?

A. No, sir.

X Q. 286. Have you ever been selling it?

A. No, sir. I had a few samples sent to me by the for-
684 warding agent who had a few cases here and wanted me to buy it, and he sent me some samples; that is all I ever had of him.

X Q. 287. You never sold it?

A. Never sold any of it; no, sir.

X Q. 288. But you are selling the Hungaria water, are you not?

A. Yes, sir.

X Q. 289. How long have you sold the Hungaria water?

A. I have sold that now for over a year and a half.

X Q. 290. That has never been called a Hunyadi water?

A. Never called; no, sir.

X Q. 291. I notice that the first advertisement to which you have referred, namely "Defendant's Exhibit Hunyadi Arpad Advertisement No. 1" of December, 1888, shows a comparative analysis of Hunyadi Arpad, Hunyadi Janos Aesculap and Friederichshall; what was that Aesculap?

A. Aesculap was also a Hungarian bitter water.

X Q. 292. Did you sell any Aesculap water at the time?

A. Not at that time.

X Q. 293. Who sold it?

A. It was sold by the firm of Schweppe & Co.

X Q. 294. Do you know whether that Aesculap water also came from Budapest or its vicinity?

A. Yes, sir.

X Q. 295. Under what name was that water sold the Aesculap?

A. Under the name of Aesculap.

X Q. 296. That was not known as a Hunyadi water then?

A. No, sir.

X Q. 297. What do you recollect about the importation and sale of this Aesculap water about the year 1888?

A. I know there was a shipment of about 1,500 cases sent here and the water was consigned to Schweppe & Company who had a depot here or a branch of their London house here, and they couldn't sell the water and kept it on hand for five or six years and then they sold it at any price in the market here.

X Q. 298. Did you purchase it?

A. I purchased some of it.

685 X Q. 299. What was the difficulty about its sale?

A. Well, it wasn't known; it wasn't advertised.

X Q. 300. And that created a difficulty?

A. Well, it had a label which people didn't like.

X Q. 301. Do you remember how the label looked?

A. It was a white and red label.

X Q. 302. You mean a style of label that was unknown in this country here?

A. A style of label that was unknown in this country.

X Q. 303. For bitter water?

A. Yes, sir.

X Q. 304. Will you please look at this label which I now show you and state whether that was not one of the labels on that water (showing witness label)?

A. No, sir; that was not.

X Q. 305. Do you know anything about the quality of this Aesculap water?

A. The water was not good; it was too old; the water smelled; that was the great objection why the water could not be sold.

X Q. 306. Was that the case when you purchased a quantity of it?

A. That was the case; yes, sir. I had difficulty to get duplicate orders of it.

X Q. 307. Did you advertise the Aesculap?

A. No, sir.

X Q. 308. When did you purchase the Aesculap water?

A. I purchased it somewhere around the year 1890, I think it was.

X Q. 309. And at that time this water had already been here for about four or five years?

A. Yes, sir.

X Q. 310. And Schweppe had offered it for sale?

A. Yes, sir.

X Q. 311. Do you know who the parties were that owned that Aesculap spring?

A. Yes, sir; I know the parties that were in London.

X Q. 312. Who were they?

A. I think they are called the Aesculap Bitter Water Company of London.

X Q. 313. Did you have any correspondence with them with reference to this Aesculap water?

A. I had personal conversation with them when I was in London.

686 X Q. 314. Did you not cause a blue and red label to be made for this Aesculap water with the name Hunyadi Aesculap on it?

A. Yes, I think I did.

X Q. 315. Was that label put upon the bottles of this water?

A. Yes, sir.

X Q. 316. Did you then sell any such water so labeled?

A. I sold some of it; yes, sir.

X Q. 317. That added one more to your stock of Hunyadi waters, did it not?

A. Yes, sir.

X Q. 318. So that, when a party came to you to ask for a bottle of Hunyadi, you might give out a bottle of this water?

A. I might have done so; yes, sir.

X Q. 319. Previous to that time you would not have done so?

A. I would not have given them Æsculap when they asked for Hunyadi.

X Q. 320. But after the name had been changed then you were at liberty to give a bottle of Hunyadi Æsculap?

A. Yes, sir.

X Q. 321. And you did it?

A. I don't remember if I did.

X Q. 322. Did it ever acquire any large sale, this Hunyadi Æsculap?

A. No, sir.

X Q. 323. Is there any matter of difference between these various waters which you have called Hunyadi waters and the other Hungarian bitter waters which are not called Hunyadi waters, except the name?

A. I think the analysis is more or less the same of all of them.

X Q. 324. So that as to the character of the water there is no difference?

A. There is no difference.

X Q. 325. It is only the name?

A. Only the name.

X Q. 326. Are you still selling any Hunyadi waters excepting Hunyadi Janos?

A. Yes, sir.

X Q. 327. What Hunyadi waters do you sell?

A. I sell Hunyadi Matyas now and I sell Hunyadi Janos; that is the only Hunyadi I sell.

X Q. 328. If a party comes to you now and demands a bottle of Hunyadi, what do you give him?

A. I give him whichever I have on hand; sometimes I
687 am out of Hunyadi Matyas and I give him Hunyadi Janos.

X Q. 329. You don't make any difference between the water?

A. Except the customer specifies what he wants. If he asks for a bottle of Hunyadi I give him whatever I have on hand.

X Q. 330. Do you make a larger profit on the Hunyadi Matyas than the Hunyadi Janos?

A. I make a little more money out of the Hunyadi Matyas.

X Q. 331. You get that at a lower price?

A. Yes, sir.

X Q. 332. And at what price do you sell it?

A. I sell it at twenty-five cents a bottle, both of them.

X Q. 333. You still sell also at retail?

A. Yes, sir.

X Q. 334. And also at wholesale?

A. Yes, sir.

X Q. 335. Are you not the defendant in a suit which Emilie Saxlehner has brought against you in the supreme court of the State of New York for selling waters not Hunyadi Janos under the name Hunyadi?

A. I know I am the defendant in a suit for selling the Hungaria water, but not any other water. I am the defendant in a suit on a water bearing the name Hungaria water.

X Q. 336. And that suit was brought by Emilie Saxlehner?

A. Yes, sir.

X Q. 337. Do you know exactly the contents of the complaint against you?

A. I don't recollect now.

X Q. 338. I notice that in the advertisement to which you have referred, Defendant's Exhibit Hunyadi Advertisement No. 2, the phrase is contained: "The Hunyadi Arpad water is one of the same class as the Hunyadi Janos." Do you know whether the first advertisements of Hunyadi Arpad water contained this phase?

A. I do not remember.

X Q. 339. Is this the first advertisement of Hunyadi Arpad which you can produce?

A. I do not remember any more.

688 X Q. 340. You don't know in what year it was published or advertised, this advertisement?

A. I couldn't say, sir, without referring.

X Q. 341. Is the bottle which I now show you bearing a red and white label and the name Æsculap like the bottles of Æsculap water which you purchased of Schweppe as testified to by you?

A. Yes, sir.

Complainant's counsel offers in evidence the bottle referred to by the witness, and it is marked "Complainant's Exhibit Æsculap Bottle, March 4, 1898, J. A. S., ex'r."

X Q. 342. You have stated that you continued to sell the Victoria water and the Rakoczy Gyorgy water during the time while you were enjoined from selling any Hungarian bitter waters not Hunyadi Janos as Hunyadi waters; was that because these waters, the Victoria and the Rakoczy Gyorgy, were not sold or demanded under the name Hunyadi?

A. Yes, sir.

X Q. 343. Did you ever advertise Hunyadi Bela?

A. No, sir.

X Q. 344. The sales of that water remain small?

A. Yes, sir.

X Q. 345. Had you any preference for Hunyadi Arpad or Hunyadi Bela by reason of any difference in the waters?

A. No, I had no difference except I preferred to sell Hunyadi Arpad because it was advertised and would sell better and the price being the same I had less difficulty in selling them.

X Q. 346. Do you know whose head is in the medallion of the Hunyadi Bela label?

A. I don't know whose head that is.

X Q. 347. Have you ever sold the Franz Joseph water?

A. Yes, sir.

X Q. 348. During what years?

A. I have sold Franz Joseph from the year 1876 on.

X Q. 349. Continuously?

A. Continuously till about 1890 or something like that.

X Q. 350. Did that come under a white label?

A. It came under a red and white label.

689 X Q. 351. Did it not for some years come under a perfectly white label with a slight blue rim around it?

A. It was only later after they discontinued the red and white label.

X Q. 352. When was that that the white label was used for the Franz Joseph water?

A. It was up till I think about 1890 or 1892; maybe the last two or three years have I bought it with a different label.

X Q. 353. You mean during the last two or three years it has been sold under that label?

A. Yes, sir; because they established an agency in the country and they adopted a different label.

X Q. 354. Who is the agent in this country who sells the Franz Joseph water?

A. A gentleman by the name of Malloy, I think, here in Beekman street.

X Q. 355. Under what name is the Franz Joseph water demanded and sold?

A. Franz Joseph.

X Q. 356. Has that always been the case?

A. It has always been the case.

X Q. 357. So that wherever a party wanted to get a bottle of Franz Joseph, he called for it specifically by that name?

A. Yes, sir.

X Q. 358. Has that ever been known as a Hunyadi water?

A. No, sir.

X Q. 359. When a party asked you for a bottle of Hunyadi, you would not give out a bottle of Franz Joseph water, would you?

A. No, sir.

X Q. 360. Do you know where the Franz Joseph water comes from?

A. From Buda-Pesth, as far as I know.

X Q. 361. Do you know who is the owner of the spring Franz Joseph?

A. A fellow named Hirschler.

X Q. 362. Do you know whether that has ever been heavily advertised in this country, the Franz Joseph?

A. It has never been heavily advertised in this country; no, sir.

X Q. 363. Did you ever have the agency for that water?

A. No, sir.

690 X Q. 364. Then you mean only to testify that you have never seen any advertisements of that water?

A. I never seen any advertisements, not to my recollection.

X Q. 365. Do you know whether the Hunyadi Laszlo water was advertised in this country?

A. I don't think it was.

X Q. 366. Do you know whether the Hunyadi Janos water was advertised in this country after 1882?

A. Yes, sir.

X Q. 367. Continuously?

A. Continuously.

X Q. 368. Largely?

A. Very largely; yes, sir.

X Q. 369. Do you know whether it was advertised in the daily papers?

A. Yes, sir.

X Q. 370. Also largely there?

A. Yes, sir.

X Q. 371. Has it always remained one of the most largely advertised bitter waters?

A. Yes, sir; it has.

X Q. 372. You have spoken of a water called Hunyadi Joseph; who sold that water?

A. It was sold by Hossfelt & Wirl.

X Q. 373. Do you know whether that water acquired any large sale?

A. No, sir; the sale was very limited.

X Q. 374. Very small?

A. It was very small; in fact, I never sold a case of it.

X Q. 375. But you saw it offered?

A. I saw it offered; yes, sir.

X Q. 376. Was it offered to you?

A. It was offered to me too; yes, sir.

X Q. 377. You didn't take a case of it?

A. I never sold a case of it; no, sir.

X Q. 378. Do you frequently sell such water on commission for others?

A. I very frequently get orders of that kind; yes, sir.

X Q. 379. Why did you not take hold of this Hunyadi Joseph water?

A. Because I could buy other Hunyadi waters cheaper.

X Q. 380. What was the color of the label?

A. It was white and blue.

X Q. 381. Did that make any difference in the sale of the water?

A. I don't think it would.

691 X Q. 382. You mean that a Hungarian bitter-water label with white and blue colors, would find as ready a sale as a water with a red and blue label?

A. Oh, I think it would make a little difference; yes, sir.

X Q. 383. It would make a difference?

A. Yes, sir.

X Q. 384. The red and blue draws better, does it not?

A. The red and blue would sell a little better than a white and blue.

X Q. 385. There is no reputation established for a white and blue?

A. Well, I wouldn't call that reputation; it don't look as good.

X Q. 386. No demand for it?

A. No demand for it.

X Q. 387. There is a demand for red and blue Hungarian bitter waters?

A. Yes, sir; there is a demand for it.

X Q. 388. Are not people largely guided by the colors on such bottles in demanding water?

A. They are.

X Q. 389. And if such bottle bears a red and blue label and the name Hunyadi on it, it finds a ready sale, does it not?

A. They would find a better sale than with a white and blue label; yes, sir.

X Q. 390. What is the color of the Loser Janos label that you have talked about?

A. Red and white.

X Q. 391. Do you know anything about the character of the water?

A. I don't know anything about the character of the water; no, sir.

X Q. 392. You don't know that there is and difference between the waters of the Loser Janos and the other Hungarian bitter waters?

A. No, sir; I don't know whether there is any difference or not.

X Q. 393. Can you state how large your sales of Hunyadi Janos water with the red and white label were after 1876, as compared with the sales of the blue and red label water here in this country until 1882?

A. Well, I have sold more Hunyadi water red and white label than with the blue and red label.

692 X Q. 394. While you sold this water under the red and white label, the Apollinaris Company sold it under a blue and red?

A. Yes, sir.

X Q. 395. And you were in competition with the Apollinaris Company at that time?

A. Yes, sir.

X Q. 396. You would naturally then sell your red and white label water and the Apollinaris Company sell its blue and red?

A. Yes, sir.

X Q. 397. And the Apollinaris Company largely advertised the Hunyadi Janos water at that time?

A. Yes, sir.

X Q. 398. Did you advertise it?

A. No, sir.

X Q. 399. Do you know how this water of the Apollinaris Company was sold at that time; I mean from 1876 till 1882; was it sold in drug stores?

A. Yes, sold in drug stores and grocery stores.

X Q. 400. And in the hands of mineral-water dealers?

A. Yes, sir.

X Q. 401. Is the bottle which I here show you a bottle of the Aesculap water bearing the label prepared by you in connection with the English concern and marked Hunyadi Aesculap?

A. I think it is; yes, sir.

The bottle referred to is offered in evidence by complainant's counsel and it is marked "Complainant's Exhibit Hunyadi Aesculap Bottle, March 4, 1898, J. A. S., ex'r."

PAUL SCHERER.

Attest: JOHN A. SHIELDS, *Examiner.*

JOSEPH MENDELSON, sworn and examined for defendants, testified as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. Joseph Mendelson; age, 45; I am treasurer of the Eisner & Mendelson Company; I live at 37 West 87th street, New York city.

Q. 2. What position did you occupy in the predecessor of the present Eisner & Mendelson Company?

693 A. The same position, treasurer and one of the managers.

Q. 3. Were you in Europe in the year 1890?

A. Yes, sir.

Q. 4. Did you have any conversation in that year with Mattoni with reference to the 1890 Hunyadi Matyas lease?

A. Yes, sir.

Q. 5. Did you conduct any negotiations which eventuated in the said 1890 contract on behalf of the Eisner & Mendelson Company?

A. Yes, sir.

Q. 6. Were such negotiations completed by you?

A. No, sir; they were written out in contract form and mailed to Mr. Eisner by Mr. Mattoni or Mattoni & Wille.

Q. 7. Did you see the Apollinaris Company, Limited, or any of its officials with reference to this proposed Hunyadi Matyas lease?

A. Yes, sir.

Q. 8. If so, when?

A. I called at the office of the Apollinaris Company in London, and sent my card to Mr. Stein Kopff, the president of the Apollinaris Company and representative of Andreas Saxlehner.

Mr. KNAUTH: Objected to as incompetent to prove the agency or representative character of Andreas Saxlehner.

A. I introduced myself and notified him that we were about leasing the Hunyadi Matyas spring and had a conversation in reference thereto; also whether we could make a friendly combination as to prices. I informed him that we would advertise the water extensively, that we now virtually owned the spring and would push it in every way, shape and form and that we expected to do quite a large business in the article.

Q. 9. What did he say with reference to this?

Mr. KNAUTH: Objected to as incompetent.

A. He stated that he could have no objection to that, that there were other Hunyadi waters and that no arrangement of that kind would interest him. He gave me to understand that we
694 hadn't got such a big thing, that he might come into the market with the Hunyadi water at five dollars a case.

Q. 10. Did he make any protest or objection to the Eisner & Mendelson Company selling Hunyadi Matyas in the United States?

Mr. KNAUTH: Objected to as incompetent.

A. No, sir.

Cross-examined by Mr. KNAUTH:

X Q. 11. You say that you had a conversation with Mattoni about the lease of the spring called Hunyadi Matyas No. 2. Did you have only one conversation with him about that?

A. We had one interview, and as I am not much of a German scholar and in fact speak German very poorly—especially at that time—I speak it a little better now—he said if I could remain in Vienna for a few days he would telegraph one of his representatives, a Mr. Kahn, although he would have preferred if I would have gone to Budapest. I was there both on pleasure and a little business, having a friend with me, a Mr. C. E. Blair.

X Q. 12. Did you not go to Budapest at all on that occasion?

A. No, sir; not at all.

X Q. 13. Have you ever been at Budapest?

A. No, sir; never.

X Q. 14. What did you know about Mattoni's several springs at that time?

A. Very little. Mr. Eisner has always taken up that branch of

the business, but at Berlin he sent me a memorandum outlining about how we would lease the springs or take hold of them and desired me to see whether I could consummate that with Mr. Mattoni.

X Q. 15. Did you know anything about the capacity of the various springs owned by Mattoni at that time?

A. I hadn't the remotest idea.

X Q. 16. Did you know anything about the different kinds of water which came from these various springs?

A. Merely those which were selling in this country.

695 X Q. 17. You had, by your first contract with Mattoni, obtained a sole agency for all of Matton-'s springs, had you not?

A. I believe so; I don't recollect much about it.

X Q. 18. And at time Mattoni was selling the waters of different springs, was he not?

A. Yes, sir.

X Q. 19. There were four or five of them?

A. That I couldn't tell you; I don't know how many. We were handling the Giesshuebl water——

X Q. 20. No, I mean of Mattoni's waters at Budapest.

A. I couldn't tell you how many springs he has.

X Q. 21. You didn't take any interest in that particular spring at Mattoni's?

A. Only the Hunyadi Matyas.

X Q. 22. Why did you take an interest in that particular spring?

A. Because we had concluded that that was the spring that we would handle.

X Q. 23. When you drew up this lease and had this conversation with Mattoni about it, did you not inquire about the location of this spring Hunyadi Matyas No. 2?

A. No, sir.

X Q. 24. How did you know that your water previous to that time came from that spring or from some other spring?

A. I know it was shipped from Budapest to us by Mattoni.

X Q. 25. And it was shipped to you under labels which only contained the name Royal Hungarian bitter water at that time?

A. Yes, sir.

X Q. 26. You remember that?

A. I think that was the name.

X Q. 27. It didn't bear any other name, but that; I mean before you made the lease?

A. I really couldn't tell you; I never took much interest in the details of that branch of the business; all I attended to was the finances.

X Q. 28. Don't you remember the bottle which has been offered in evidence here as a bottle of Royal Hungarian bitter water as imported and sold by you?

A. Yes, sir; we handled that bottle.

696 X Q. 29. In looking at that bottle there was no name of any spring on it, was there?

A. I couldn't recollect; I wouldn't be positive about it.

X Q. 30. Having that agency for all of Mattoni's springs in 1889, why did you select this one particular spring called Hunyadi Matyas No. 2 as the one which you wanted to have?

A. I couldn't give you that information. Mr. Eisner had that department or branch of the business; it was entirely in Mr. Eisner's hands. I attended to this preliminary arrangement upon instructions from Mr. Eisner.

X Q. 31. But Mr. Eisner has stated that this matter of the lease of 1800 was arranged by you and Mattoni; was there not something arranged between you and Mattoni about this particular spring? What was said between you and Mattoni?

A. That we desired to control one of the springs; that we wanted to adopt our own label, our own trade-mark, and desired the privilege also or option of buying the spring eventually if we so desired.

X Q. 32. And that was this spring Hunyadi Matyas No. 2?

A. That was the Hunyadi Matyas spring.

X Q. 33. It was called Hunyadi Matyas No. 2; you know that from the lease, do you not?

A. I really wouldn't be positive; I wouldn't state that because I don't recollect.

X Q. 34. You don't recollect at all having inquired about the Hunyadi Matyas spring not No. 2?

A. I recollect the Hunyadi Matyas spring.

X Q. 35. Didn't this indication of No. 2 indicate to you that there was also some other spring called Hunyadi Matyas?

A. I don't recollect the question coming up of any number. The interview with Mattoni was not very satisfactory, because I couldn't make myself very well understood. Mr. Mattoni doesn't speak English, and I speak a very, very poor German; in fact, I never spoke German until I associated myself with Mr. Eisner.

X Q. 36. Had you instructions from your company or
697 from Mr. Eisner or from anybody to procure a lease of this spring Hunyadi Matyas No. 2?

A. I don't recollect the number. My own recollection is the Hunyadi Matyas spring. I didn't stay there long enough for the documents to be submitted to me after they were drawn up, because I went to Rome from Vienna on a pleasure trip and was in a hurry to get off, so I had all details arranged by mail, had them draw up the contracts, and had them submitted to Mr. Eisner.

X Q. 37. Have you stated that correspondence which you had with Mattoni, and your firm or corporation of the Eisner & Mendelson Company of that year?

A. I never had any correspondence with Mattoni personally.

X Q. 38. Who had it?

A. The firm.

X Q. 39. I mean who conducted the correspondence with Mattoni?

A. Mr. Eisner entirely; I never attend to any foreign correspondence.

X Q. 40. You don't know where that correspondence is now?

A. I haven't the remotest idea. I suppose Mr. Eisner looked all through and got out the correspondence and submitted it to you.

X Q. 41. Not of those years?

A. I couldn't tell you anything about it.

JOSEPH MENDELSON.

Sworn to this 15th day of March, 1898.

JOHN A. SHIELDS, *Examiner.*

(Examination closed.)

Adjourned to Monday, March 7, 1898, at 1 p. m.

698 SAXLEHNER } *v.* EISNER. }

NEW YORK, *March* 8, 1898.

Met pursuant to adjournment.

Present: Counsel as before.

WILLIAM J. QUENCER, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. William J. Quencer; age, 30; pharmacist, 400 West 57th street, cor. of 9th avenue.

Q. 2. How long have you been engaged in that business at that place?

A. Eight years this spring.

Q. 3. Previous to that were you engaged in the same business?

A. Yes, sir.

Q. 4. For how long?

A. Seven years.

Q. 5. So as I understand you, you have had an experience of fifteen years as a pharmacist, eight of which you have had this store at the corner of Ninth avenue and 57th street; am I correct?

A. Yes.

Q. 6. Where were you during the seven years prior to the last eight years?

A. I was a year engaged in the retail drug business as clerk in New York city, two years in the college of pharmacy from which I graduated and four previous years to that in Watertown, Jefferson county, New York.

Q. 7. During the last eight years what Hunyadi waters have you sold?

A. Four—Arpad, Lajos, Janos and Matyas.

Q. 8. Look at the bottle now shown you and state whether it represents the labels, bottles and capsules of the Hunyadi Matyas water which you say you have sold during the last eight years (showing witness bottle marked "Complainant's Exhibit B" of Hunyadi Matyas water).

A. Yes, sir; that is the Matyas.

Q. 9. Look at the bottle now shown you marked "Defendant's Exhibit Hunyadi Arpad Bottle," and state whether or not the labels, bottles and capsules of such exhibit bottle represent the labels,
699 capsules and bottles of the Hunyadi Arpad which you have sold during the last eight years?

A. Yes, sir.

Q. 10. Look at the bottle now shown you marked "Complainant's Exhibit Complainant's Former Bottle," being a Hunyadi Janos bottle, and state whether or not the main label on such bottle, the bottle itself and the capsules are like the labels, bottles and capsules of Hunyadi Janos water you have sold during the last eight years.

A. That is the Janos bottle.

Q. 11. Look at the bottle now shown you marked "Defendant's Exhibit Hunyadi Lajos Bottle," and state whether or not the Hunyadi Lajos water which you say you sold during the last eight years resembled as regards labels and bottles this exhibit.

A. Yes, sir.

Q. 12. How about the capsules on the Hunyadi Lajos bottles, were they the same in general style and appearance as the capsules on the Hunyadi Janos, Matyas and Arpad?

A. Yes, sir.

Q. 13. During the last eight years when a customer has called at your store and asked for Hunyadi water, what do you do?

A. I ask him which kind of Hunyadi water he wants.

Q. 14. And then?

A. Well I show them the bottles and give them the kind they take. I tell them "We have one kind named Janos, another Matyas," which at the present time we are handling, and previous to that the same; that is whatever kinds we are handling. I give them the choice; they take whichever one they want.

Q. 15. During the last eight years, if a customer has come in and asked for Hungarian bitter water, what have you done?

A. The same thing.

Q. 16. What have you understood the words "Hunyadi water" to mean during the last eight years?

A. I have understood them to be a name for a bitter water or cathartic water—a general name.

Q. 17. What have you understood the words "Arpad, Matyas and Janos" to mean?

700 A. That is, I suppose, the name of whatever different kind of Hunyadi water there was.

Q. 18. Referring to different springs?

A. Yes, sir.

Q. 19. So that, as I understand you, you have understood the word "Hunyadi" to mean a general class of waters to which Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad and Hunyadi Lajos belonged?

Mr. KNAUTH: Objected to as leading.

A. Yes, sir.

Q. 20. How were the different springs distinguished from each other?

A. By the second name, Matyas, Janos or Lajos.

Cross-examined by Mr. KNAUTH:

X Q. 21. Are you not mistaken when you state that you have sold the water called Hunyadi Lajos, a bottle of which has been shown to you, during the last eight years?

A. I have sold in the meantime, from the time I started there up to the present time that water.

X Q. 22. You did not mean to testify, then, that you had sold continuously for eight years last past the four waters which you have named, namely, Arpad, Lajos, Janos and Matyas?

A. Continuously.

X Q. 23. Continuously during eight years?

A. No, sir; I have not.

X Q. 24. What you meant to say was that within a period of eight years last past you have sold these waters, some of them in some years and others in other years?

A. Yes, sir.

X Q. 25. That was the meaning of your testimony?

A. Yes, sir; at different times.

X Q. 26. Do you know how long you have sold this Hunyadi Lajos water in bottles like the one which was shown to you?

A. I couldn't state that exactly; I couldn't tell.

701 X Q. 27. You can't tell?

A. No; I couldn't tell that without looking it up.

X Q. 28. You couldn't even tell how many years it was?

A. Not positively, to swear to; no, sir.

X Q. 29. Are you now selling this Hunyadi Lajos water in bottles such as the one shown to you?

A. No, sir.

X Q. 30. Why aren't you selling it now?

A. Well, it hasn't been offered to the trade, I suppose.

X Q. 31. Are you now selling that same water under another label?

A. No, sir; not that I know of.

X Q. 32. Are you selling any so-called Lajos water under a green and red label?

A. No, sir; I am not.

X Q. 33. Are you aware of the fact that the importer of this Hunyadi Lajos water has discontinued the use of this red and blue label, or red and brown label which was shown to you, and adopted another label for that water?

A. I don't know that.

X Q. 34. Are you now selling any Hunyadi Arpad water in bottles, such as shown to you?

A. I am not.

X Q. 35. Since when have you not sold any such Hunyadi Arpad water?

A. I couldn't state that.

X Q. 36. For several years past?

A. I couldn't state exactly; I don't remember that.

X Q. 37. You don't remember?

A. No, sir; I do not.

X Q. 38. Do you sell the Hunyadi Janos water and the Hunyadi Matyas water at different prices?

A. Yes, sir.

X Q. 39. What are the prices at which you sell them to the public?

A. The Janos water is twenty-five cents; the Matyas is twenty-one.

X Q. 40. When and where did you commence your experience as a clerk in a drug store?

A. Watertown, Jefferson county, New York.

X Q. 41. That was when?

A. Fifteen years ago.

X Q. 42. About the year 1887?

A. 1883 that would be.

702 X Q. 43. How old were you then?

A. I was fifteen years of age.

X Q. 44. Where were you born?

A. Watertown, New York.

X Q. 45. Did you sell any Hunyadi Janos water in that drug store in Watertown?

A. No, sir.

X Q. 46. You did not?

A. No, sir.

X Q. 47. You did not deal in any Hungarian bitter waters?

A. Not that I remember of; no, sir.

X Q. 48. When did you first come in contact with the Hunyadi Janos water?

A. New York city.

X Q. 49. When was it?

A. Nine years ago.

X Q. 50. In what drug store was it?

A. In the same store I am at the present time; James S. Schofield owned the place then.

X Q. 51. Did you sell any Hunyadi Janos water at that time?

A. I probably did; I couldn't positively swear to that; I don't remember.

X Q. 52. How is it that you do remember that eight years ago, which is only one year later, you sold Hunyadi Matyas water, Hunyadi Arpad water and Hunyadi Janos water?

A. I didn't say that I had sold them all eight years ago; I don't remember selling the Matyas eight years ago; it was within the eight years.

X Q. 53. Do you know in what year thereafter you first sold Hunyadi Matyas water?

A. No, I couldn't state that.

X Q. 54. Can you state whether you first sold any Hunyadi Arpad water or first sold any Hunyadi Janos water?

A. No, sir; I could not.

X Q. 55. How did the public usually demand that water in those years, 1889 and 1890, if you know; I mean at your drug store?

A. Well, I don't quite catch your question.

X Q. 56. What would a customer say who came into the store and demanded a bottle of that water? Would he say "Give me a bottle of Hunyadi"?

A. Yes.

X Q. 57. Has that been the common way in which the
703 public has asked for this water?

A. Which water do you mean?

X Q. 58. I mean Hunyadi water?

A. Any brand?

X Q. 59. Yes.

A. Yes, sir; general speaking.

X Q. 60. The public usually use only the term "Hunyadi water"?

A. Sometimes they ask for Janos and sometimes they ask for Matyas, or whatever kind we handled in our store.

X Q. 61. As you were selling several kinds of such waters at your store, would your customers call for any specific brand of that water?

A. Sometimes.

X Q. 62. What was the usual custom?

A. Well, the usual custom was to call for the particular kind they wanted, and when they didn't I would ask them which they wanted, the Janos or whichever kind I was handling—Matyas, Arpad, or Lajos.

X Q. 63. You mean that a customer would come into the store and say "Give me a bottle of Hunyadi Lajos water"?

A. At that time; yes, sir.

X Q. 64. Using the full name?

A. Yes, sir.

X Q. 65. But you don't remember when that was?

A. Well, I couldn't give you just the exact dates, but the Lajos water, if I remember rightly, was sold some time ago—five, six or seven years ago.

X Q. 66. And you mean that was called for under the name "Hunyadi Lajos" water?

A. Yes, sir.

X Q. 67. Not under the name of "Hunyadi water"?

A. No, sir.

X Q. 68. But when a customer asked for Hunyadi water you would then ask him which he wanted?

A. Which kind of Hunyadi water he wanted.

X Q. 69. Under what name does the public demand the water more frequently, under the name of the specific spring or under the name of Hunyadi water?

A. I couldn't answer that.

X Q. 70. Why can't you answer that?

A. Well, I don't know which one they called for most; I couldn't swear to that, which one they asked for.

X Q. 71. I am not asking you which one they asked for more frequently, but whether they used the term Hunyadi water or
704 the name of any specific spring more frequently?

A. Well, I couldn't answer that question.

X Q. 72. Don't you know that it is a general custom among physicians to simply prescribe Hunyadi water to their patients?

A. I do not.

X Q. 73. You mean you don't receive any prescriptions from physicians or slips of paper on which a bottle of Hunyadi water simply is recommended to the patient?

A. No, sir.

X Q. 74. You do not?

A. No, sir.

X Q. 75. What did you originally understand under the name Hunyadi water?

A. Well, I suppose that Hunyadi water meant an imported bitter water or cathartic water; I understood that.

X Q. 76. You didn't know anything about its origin?

A. No, sir; I didn't know anything about that.

X Q. 77. Do you know anything more about it today?

A. No, sir.

X Q. 78. You do not?

A. No, sir.

X Q. 79. How do you distinguish these waters which you have called Hunyadi waters from other Hungarian bitter waters?

A. By the name on the label.

X Q. 80. Only by the name on the label?

A. Yes, sir.

X Q. 81. You have said that to your mind the word Hunyadi denoted a certain class of bitter waters; do you mean to say that this class is only distinguished from other bitter waters by having the name Hunyadi on the label?

A. I mean that that word Hunyadi is a word that applies to a cathartic water or to a spring.

X Q. 82. That doesn't answer my question. Is there anything else, except what is stated on the label, which distinguishes this class of Hunyadi water as you have called it from other Hungarian bitter waters?

A. You mean any particular one water?

X Q. 83. No, this size; that is all; nothing else.

(No answer.)

705 X Q. 84. I show you now a bottle which has been offered in evidence and marked Complainant's Exhibit Royal Hungarian Bitter-water Label. Do you call that a Hunyadi water?

A. I don't know; I never saw that before.

X Q. 85. Do you call it a Hunyadi water?

A. Yes, I should call it that although I have never seen it.

X Q. 86. Why would you call that a Hunyadi water?

A. Because it is put up in a style like the other waters and generally understood to be a cathartic water.

X Q. 87. You mean that any cathartic water is called Hunyadi water?

A. No, sir; only the imported.

X Q. 88. Why do you call this water then Hunyadi water?

A. Well, I don't want to lead from you; I want to try and answer you, but I don't catch on.

X Q. 89. That doesn't make any difference; just answer the questions.

(X Q. 88 repeated.)

A. Because it is put up in a style and package like the other Hunyadi waters that I have sold.

X Q. 90. Don't you notice that this water has no red and — label, but a red and white label?

A. Yes, I notice that.

X Q. 91. Doesn't that make any difference to you?

A. No, I can't say that it does.

X Q. 92. Then the label has nothing to do with the name Hunyadi?

A. Well, the label says here "Hungarian bitter water," so of course I take that to be a Hunyadi water.

X Q. 93. Then in your opinion every Hungarian bitter water is a Hunyadi water?

A. Yes, sir.

X Q. 94. Whether it is called Hunyadi on the label or not doesn't make any difference?

A. Yes, sir.

X Q. 95. And if somebody came into your store and asked for a bottle of Hunyadi water you would give him then any bottle of Hungarian bitter water that you happened to have?

A. No, sir.

X Q. 96. Why not?

A. I would ask him which kind of Hunyadi water he wanted.

X Q. 97. But if you ask him that question, why should
706 you ask him for any specific kind, if you say that this is a bottle of Hunyadi water?

A. I suppose it is a bitter water or cathartic water from some one of the Hunyadi springs.

X Q. 98. Where are the Hunyadi springs?

A. I couldn't answer you that; they are in Europe somewhere.

X Q. 99. You don't know?

A. No, sir; I do not. They are in Austria, I think.

X Q. 100. You don't know who owns them?

A. No, sir; I do not.

X Q. 101. You don't know how many there are?

A. No, sir; I do not.

X Q. 102. You don't know where they are situated?

A. No, sir; I do not.

X Q. 103. You don't know anything about it?

A. No, sir.

X Q. 104. You have said that the waters belonging to that class which you call Hunyadi are distinguished by separate names; now state by what name this water is distinguished which you have before you and in your hands.

A. For the simple reason that I always understood that the words "Hunyadi water" or "bitter water" meant a certain water from different Hunyadi springs on the other side. It says "bitter water" in here and therefore I should take either the importer or the owner, whichever name is labelled on it, if they were reputable, to be as they represented on the label.

X Q. 105. Did you ever sell any Franz Joseph water?

A. I don't remember that.

X Q. 106. Did you ever sell any Apenti water?

A. I am selling that at the present time.

X Q. 107. Did you ever sell that as Hunyadi water?

A. Yes, sir.

X Q. 108. Still selling it as a Hunyadi water?

A. Yes, sir.

X Q. 109. Did you ever sell any so-called Hungarian water?

A. No, sir.

X Q. 110. Did you ever sell any Rakoczy Janos water?

A. No, sir.

707 X Q. 111. Did you ever sell any Rakoczy Gyorgy water?

A. No, sir.

X Q. 112. Did you ever sell any Aesculap water?

A. No, sir.

X Q. 113. If a customer comes to your store and demands a bottle of the genuine Hunyadi, what do you give him?

A. Well, I would ask him which kind of Hunyadi water he meant.

X Q. 114. And if he says that he does not know anything more but he wants the genuine Hunyadi, what do you give him?

A. I would take and show him the different kind of Hunyadi water I have and let him take his choice.

X Q. 115. And if he doesn't say that he doesn't know and leaves it to you, what do you give him?

A. I generally sell Matyas at the present time.

X Q. 116. Do you make the most profit on the Matyas?

A. Yes, sir.

X Q. 117. Has that always been the case?

A. That I don't remember.

X Q. 118. Who is the present owner of your drug store?

A. Myself, William J. Quencer.

X Q. 119. Since when have you been the owner of your drug store?

A. It will be eight years this spring.

X Q. 120. Did you purchase it?

A. I did.

X Q. 120½. Of whom?

A. Voorhees; I think his initials are W. H.

X Q. 121. Was he a druggist?

A. Yes, sir.
X Q. 122. What has become of him?
A. I couldn't answer that; I don't know.
X Q. 123. You don't know where he is?
A. No, sir; I do not.
X Q. 124. What became of Schofield, the former owner?
A. I think he is dead.
X Q. 125. There have been about a dozen physicians examined in this case as witnesses, who have testified that they have known the Hunyadi Janos water for a long number of years in this market sold under the name Hunyadi, and that when they prescribed
708 Hunyadi water they meant Hunyadi Janos water. Do you mean to testify that that has not been your understanding?

Mr. Coe: Objected to as immaterial and irrelevant and an unfair statement of the testimony referred to.

A. Not that I remember.
X Q. 126. You mean at no time did you connect the name Hunyadi with Hunyadi Janos more than with any other water?
A. No, sir.
X Q. 127. You had no experience whatever with Hungarian bitter waters prior to 1889?
A. Not that I remember.

(Cross-examination closed.)
(Signature waived.)

Thad. D. Willson, sworn and examined for defendant, testifies as follows:

Direct examination by Mr. Coe:

Q. 1. What is your name, age, residence, and occupation?
A. Thad. D. Willson; I am thirty-five years of age; my residence is 252 Lewis avenue, Brooklyn; I am a buyer.
Q. 2. For what firm?
A. Lehn & Fink.
Q. 3. How long have you occupied that position for Lehn & Fink?
A. Fourteen years.
Q. 4. During that time have Lehn & Fink sold Hunyadi water?
A. They have.
Q. 5. What Hunyadi waters?
A. Whatever were on the market at the time.
Q. 5½. Do you remember what Hunyadi waters have been on the market during these last eight years?
A. Well, that would be a matter of guess with me. I can recall what waters have come to my notice, but whether they have been there within eight years' time or not, I couldn't say.
Q. 6. During that period please state what Hunyadi waters have come to your notice.

A. Hunyadi Matyas, Hunyadi Arpad, Hunyadi Bela, Hun-
709 yadi Janos, Hunyadi Vilmos, Hunyadi Lajos and Hunyadi Laszlo; I think that covers the ground. It is merely a matter of guess with me.

Q. 7. Have you bought these waters for the firm of Lehn & Fink at one time or another during the last eight years?

A. Two or three of the springs we have not bought.

Q. 8. The balance you have?

A. Yes.

Q. 9. What two or three of the springs have you not bought?

A. It is merely a matter of guess with me, I am not positive of this, but I am under the impression we never have bought or I never have bought Vilmos or Bela. These are only ones I never have bought.

Q. 10. And the others you have bought more or less of during the last eight years; is that correct?

A. Yes, that is correct.

Q. 11. How does that trade generally call for these waters?

A. In what respect?

Q. 12. What do they call them, Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, or do they call for them all as Hunyadi waters?

A. They call for them under their various names.

Q. 13. Specifically as Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad and so forth?

A. They do.

Q. 14. But they are all called generally in the trade Hunyadi waters?

Mr. KNAUTH: Objected to as leading.

A. Yes, they are known as Hunyadi waters.

Q. 15. And they are specifically distinguished from each other by the names Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo and so forth?

A. They are.

Q. 16. And that has been your experience during the last eight years?

A. That has.

Q. 17. What is the firm of Lehn & Fink; what do they deal in and to what extent do they deal in different articles?

A. They are general jobbers in drugs.

710 Q. 18. Do they deal largely in mineral waters?

A. Quite largely, yes.

Q. 19. How many salesmen do they employ?

A. Twenty-two.

Q. 20. They do a large business, do they not?

A. They do.

Q. 21. Well known all over the country?

A. All over the country.

Q. 22. Is there any confusion in the trade as to these waters or do they distinctly know them under their distinctive names as Hunyadi Matyas, Hunyadi Janos, Hunyadi Arpad and so forth?

Mr. KNAUTH: Objected to as incompetent.

A. From my knowledge they are fairly known by the retail trade who order the goods.

Q. 23. By the distinctive names you have given?

A. By the distinctive names.

Cross-examined by Mr. KNAUTH:

X Q. 24. What is the trade to whom you sell?

A. Retail druggists.

X Q. 25. And in speaking of the trade you meant to refer to retail druggists who are your customers?

A. I did.

X Q. 26. Did you mean to testify that during the period of eight years last past you had sold Hunyadi Lajos water?

A. I have bought Hunyadi Lajos water.

X Q. 27. For the term of eight years last past?

A. I think you will find in my testimony that I couldn't say positively whether all those waters come in that length of time.

X Q. 28. Can you tell me how long you have known the Hunyadi Lajos water?

A. I could not.

X Q. 29. Can you tell me how long you have known the Hunyadi Bela water?

A. No, I could not.

X Q. 30. How long have you known the Hunyadi Janos water?

A. My extire experience in the drug business.

711 X Q. 31. And since when is that?

A. That is sixteen or seventeen years.

X Q. 32. Where were you before you entered the employ of Lehn & Fink?

A. Lazell, Marsh & Gardiner.

X Q. 33. Were they druggists?

A. They were jobbing druggists, wholesale druggists.

X Q. 34. Here in this city?

A. 10 Gold street, this city.

X Q. 35. Did you buy and sell Hunyadi Janos for them?

A. I didn't occupy a buyer's position there.

X Q. 36. But they had the Hunyadi Janos water at that time?

A. They did.

X Q. 37. And Lehn & Fink had the Hunyadi Janos water at the time when you entered their employ?

A. They did.

X Q. 38. And have kept it continuously?

A. They have.

X Q. 39. Did you ever sell directly to the public personally?

A. No, sir.

X Q. 40. You never did?

A. No.

X Q. 41. Do Lehn & Fink keep any Franz Joseph water for sale?

A. They do.

X Q. 42. Is that a Hungarian bitter water?
A. I never have seen it, so I couldn't say.
X Q. 43. Do Lehn & Fink sell any Apenta water?
A. They do.
X Q. 44. If Lehn & Fink obtain an order for Hunyadi water, do they ever fill it by furnishing Apenta water?
A. No.
X Q. 45. That is not called Hunyadi?
A. No.
X Q. 46. When they receive such an order for Hunyadi water, do they ever furnish Franz Joseph water?
A. No, sir.
X Q. 47. Why not?
A. Because Franz Joseph is known as Franz Joseph water, and Hunyadi waters from our point of view don't belong to that water at all.
X Q. 48. To which waters does the term Hunyadi water belong?
A. To these various springs I have mentioned.
712 X Q. 49. You mean to those springs which have the name Hunyadi as part of the name?
A. Yes, sir.
X Q. 50. And only to those?
A. And only to those.
X Q. 51. You wouldn't call a Hungarian bitter water which did not have the name Hunyadi on the label a Hunyadi water?
A. I would not, no.
X Q. 52. That has not been the understanding in the trade?
A. No.
X Q. 53. And it is not now?
A. No.

Cross-examination closed.
Signature waived.

SHERMAN F. HENNESSY, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. State your name, age, residence and occupation?
A. Sherman F. Hennessy; age, 31; residence, Elizabeth, N. J.; occupation, druggist, corner Broadway and Barclay street.
Q. 2. How long have you been at the pharmacy there?
A. About a year and a half at Broadway and Barclay street.
Q. 3. And previous to that?
A. I was with Hudnut's.
Q. 4. For how long?
A. About three years.
Q. 5. And previous to that?
A. D. F. O'Connell, 82½ Broadway.
Q. 5½. How long with him?
A. About a year as near as I can remember.

Q. 6. And previous to that?

A. I was in Jersey City before that with Ewing & Company; I think their number was 82 Montgomery street; they are now out of business.

Q. 7. This embraces a period of the last ten years, does it not?

A. No, sir.

Q. 8. How many years; about eight years?

A. No, six and a half or seven, possibly, about.

713 Q. 9. During the last seven years, in the course of your occupations at these various drug stores, have you known the various Hunyadi waters on sale?

A. I have.

Q. 10. What Hunyadi waters have you known during this period of seven years at these various drug stores where you were occupied?

A. Hunyadi Janos, Hunyadi Arpad, Hunyadi Lajos and Hunyadi Matyas.

Q. 11. When a customer would come into any of these drug stores where you were employed and ask you for a bottle of Hunyadi water what would you do or how would you fill such order?

A. I would ask him what he wanted, what kind.

Q. 12. And then?

A. If he didn't specify any particular kind I would use my own judgment as to what to give him.

Q. 13. You would give him any of these waters that you had in stock?

A. Yes, sir; any of them that I saw fit.

Q. 14. If, in response to your inquiry as to which Hunyadi water he wanted, he asked for Hunyadi Janos you would give him that?

A. Certainly.

Q. 15. And if he asked for Hunyadi Matyas, you would give him that?

A. Yes, sir.

Q. 16. And if he asked for Hunyadi Arpad, you would give him that?

A. Yes, sir.

Q. 17. And if he wasn't particular what Hunyadi he had or didn't care to specify, you would use your own judgment and give him anything you happened to have in stock; am I correct?

A. Yes, sir.

Q. 18. Then, as I understand you, these Hunyadi waters which you sold at these various drug stores were distinguished from each other by the second name or suffix, Matyas, Janos, Arpad, Lajos, etc.?

A. Yes, sir.

Q. 19. But all classed under the general term Hunyadi?

Mr. KNAUTH: Objected to as incompetent and leading.

714 A. Yes, sir.

Q. 20. Was that the custom in all the stores that you were at during the last seven years, as you have testified?

Mr. KNAUTH: Same objection.

A. Yes, sir.

Cross-examined by Mr. KNAUTH:

X Q. 21. Is your drug store or the drug store in which you are employed at present called the Astor House pharmacy?
A. Yes, sir.
X Q. 22. Do you sell any Hunyadi water over the counter by the glass?
A. Yes, sir.
X Q. 23. How long have you followed that practice?
A. Ever since I have been there.
X Q. 24. Do you dispense it yourself?
A. No, sir.
X Q. 25. Who does?
A. My clerks, the soda clerk.
X Q. 26. You do not tend to the fountain yourself?
A. No, sir.
X Q. 27. You do not dispense any bitter waters by the glass, personally?
A. No, sir.
X Q. 28. Do you sell any other Hungarian bitter waters but those which you have recited?
A. I think not.
X Q. 29. Do you sell any Hunyadi Lajos water now?
A. Very little.
X Q. 30. In what bottles; such as I show you (showing witness Defendant's Exhibit Hunyadi Lajos Bottle)?
A. No, I don't think that is the kind.
X Q. 31. Can you describe the bottle in which you sell that water now?
A. No, I don't believe I can, it is so long since I sold one of them.
X Q. 32. Do you sell any Hunyadi Arpad water now?
A. No.
X Q. 33. Since when have you not sold any Hunyadi Arpad?
A. I don't think I have sold any of it in that store.
715 X Q. 34. So you have in your present store for sale only the Hunyadi Janos and the Hunyadi Matyas?
A. I won't say positively that.
X Q. 35. That is your impression?
A. That is my impression, yes.

Cross-examination closed.
Signature waived.

GEORGE H. BANCROFT, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. George H. Bancroft; age, 38; residence, 136 West Ninety-second street, New York city; occupation, apothecary.

Q. 2. Where?

A. 205 Broadway.

Q. 3. How long have you been an apothecary in that store?

A. Twelve years with Hudnut's pharmacy.

Q. 4. Previous to your present location you were in the Herald building, were you not?

A. Yes, sir.

Q. 5. And you have been either in the Herald building or at 205 Broadway during the last twelve years?

A. Yes, sir.

Q. 6. During the time you have been with Hudnut's, and especially during the last seven or eight years, how many Hunyadi waters have you known? Name them, please.

A. Well, there is Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, and there is another one Lajos; that is the principal ones; there is another one, I cannot think the name of.

Q. 7. Laszlo, do you mean?

A. Yes, I guess that is the one.

Q. 8. Look at the bottle now shown you of Hunyadi Laszlo water and say whether or not that is the Hunyadi Laszlo water you refer to.

A. That is the one—well, I wouldn't swear to it, because
716. there is a confusion to my mind of some of those names; I wouldn't swear to it.

Q. 9. But you are sure that during the last eight years Hudnut's has sold the Hunyadi Janos, the Hunyadi Arpad, the Hunyadi Matyas and the Hunyadi Lajos?

Mr. KNAUTH: Objected to as leading.

A. Yes, sir.

Q. 10. During this period when you were selling these waters, if a customer called at the store and asked for Hunyadi water, how would you fill the order?

A. As a rule we asked them what kind. I understand that there are several kinds of Hunyadi water.

Q. 11. And you asked them which kind?

A. As a rule we asked them which kind.

Q. 12. Suppose they do not specify the kind of Hunyadi they wish.

A. Then it is our privilege to give them the kind we think they want to fill their order with.

Q. 13. You use your own judgment then?

A. Certainly.

Q. 14. And sell any of the Hunyadis you have in stock?

A. Unless we give them what they ask for.

Q. 15. And by the words "what they ask for" you mean specifying by the second name, Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad?

A. Yes; my interpretation of Hunyadi water is that it is something like the Saratoga waters, that there are a number of springs. I don't know, I have never been there, but I imagined there was a number of springs and the springs are of different names.

Q. 16. But all called Hunyadi?

A. Yes, Hunyadi appeals to me as the name of a purgative water.

Q. 17. And that has been your understanding while you have been at Hudnut's?

A. Yes.

Cross-examined by Mr. KNAUTH:

717 X Q. 18. Do you mean to say that continuously for a period of seven or eight years last past you have sold the various waters whose names you have given?

A. At different times, not always; that is to say we don't always keep a stock of all those waters, but we have sold those waters, Hunyadi Janos, Hunyadi Matyas and Laszlo; at different times we have sold different Hunyadi waters.

X Q. 19. Since when have you ceased to sell Hunyadi Lajos water?

A. I couldn't tell you that without looking at the book.

X Q. 20. Do you know when you commenced to sell Hunyadi Lajos water?

A. I couldn't give you the exact period without looking it up, but it is several years ago.

X Q. 21. Can you state when you commenced to sell Hunyadi Matyas water?

A. No, I can't tell you the exact point of any of these without looking up because from time to time we have changed the different brands.

X Q. 22. You are not selling Hunyadi Arpad any more, are you?

A. No, sir.

X Q. 23. Since when did you discontinue the sale of this water?

A. Well, I should say it was five or six years ago. Now I am only guessing at the time. The quantity of this water that we sell is so small in comparison with other things that I would have to go back to the books to get the exact dates. The thing doesn't impress itself on my mind when it was bought and when we stopped selling it because the quantities we buy and sell are so small.

X Q. 24. When a customer comes to your store what does he usually demand?

A. One man will ask for a bottle of Hunyadi Janos and another will ask for a bottle of Hunyadi.

X Q. 25. What is the usual term which is used by the public?

A. Well, it is bought on and off; one man will ask for Hunyadi and another for Hunyadi Janos, and another for one of the other kinds of Hunyadi.

X Q. 26. Are not the other kinds of Hunyadi rather seldom inquired for specifically?

718 A. No, sir; I don't think so. There is a reason why the other is sold.

X Q. 27. What is the reason?

A. Because of the difference in the price. Some people are educated, I think, to buy a lower-priced water.

X Q. 28. And the others than the Janos are all lower-priced waters, are they?

A. Lower than the Janos; they retail for a lower price.

X Q. 29. If I should go to your drug store and demand a bottle of the genuine Hunyadi, what would you furnish me?

A. We would ask what kind you wanted. We always ask what kind you want.

X Q. 30. How long have you been in the drug business?

A. I am ashamed to tell you; twenty years.

X Q. 31. Did you know the Hunyadi Janos water when you commenced?

A. At that time the department of the drug business I was in didn't handle that goods; I was in the manufacturing and prescription department and that class of goods didn't come under my handling.

X Q. 32. When did you first commence to handle Hungarian bitter water?

A. Oh, fifteen years ago, I suppose.

X Q. 33. Now fifteen years ago had you any kind of Hungarian bitter waters but Hunyadi Janos bitter water?

A. I couldn't tell you.

X Q. 34. You have no recollection about that?

A. No, sir.

X Q. 35. But you do recollect the Hunyadi Janos water, do you not?

A. I wouldn't like to say that either. My first recollection, when I took hold of those waters was Friderschall. I wouldn't like to say just the length of time that I have sold Hunyadi.

X Q. 36. Do you recollect the selling of Hunyadi Janos water previous to 1888?

A. Oh, yes.

X Q. 37. Previous to 1888 where were you then?

A. In 1888 I was at 205 Broadway.

X Q. 38. At Hudnut's store?

A. Yes, sir.

719 X Q. 39. And they sold Hunyadi Janos water did they not?

A. Yes, sir.

X Q. 40. At that time that was the only water having the name Hunyadi which was in their hands, was it?

A. That I couldn't say.

X Q. 41. You do not recollect?

A. No, sir; I couldn't say that.

X Q. 42. You couldn't state whether this had been the only one or whether there had been several?

A. No, sir; but it is my impression there was another Hunyadi water at that time although I wouldn't like to say positively and specifically.

X Q. 43. You have no recollection distinctly on subject previous to 1888?

A. No; my impression is that we had a- Arpad about that time if my memory serves me right.

X Q. 44. Don't you know that Arpad was enjoined in 1887?

A. No, sir; I do not.

X Q. 45. You do not know anything about the litigation?

A. No, sir.

X Q. 46. What do you know about these so-called Hunyadi springs? Where are they situated?

A. I don't know a thing about them, nothing.

X Q. 47. How do you know that these various waters which you have called Hunyadi waters come from different springs?

A. I don't know; I have never seen them and therefore I couldn't know.

X Q. 48. Are you dealing in any other Hungarian bitter waters not called Hunyadi?

A. Yes.

X Q. 49. Do you sell Franz Joseph water?

A. Yes.

X Q. 50. Do you sell Apenti water?

A. Yes.

X Q. 51. Do you sell Rakoczy Gyorgy water?

A. Yes.

X Q. 52. Do you sell any Victoria water?

A. We have sold a little of that, I think.

X Q. 53. These waters were not called Hunyadi waters?

A. No; I don't remember that.

X Q. 54. You wouldn't sell them as Hunyadi waters?

A. Oh, no.

720 X Q. 55. You sell as Hunyadi waters only waters which have the name Hunyadi on the label?

A. Yes, sir.

X Q. 56. Did you ever sell any Aesculap water?

A. No, I don't remember that.

X Q. 57. Would you call that a Hunyadi water (showing witness bottle)?

A. No, I would not.

X Q. 58. Did you sell any Royal Hungarian bitter water like the one that I now show you (showing witness bottle)?

A. No, I don't remember selling that.

X Q. 59. Would you call that a Hunyadi water?

A. I don't know but what I would call that one of the Hunyadi waters.

X Q. 60. Why?

A. I think there is an impression among the trade that all Hungarian waters come under the head of Hunyadi waters; I think

that that is the impression among the trade and among the majority of people who use it.

X Q. 61. Then you would sell Apenti water also as Hunyadi water?

A. I think it is one of the Hunyadi waters.

X Q. 62. And it is sold as such?

A. That I don't know.

X Q. 63. You don't mean to say that you sell it?

A. No, but I think it is; I think the general acceptance of the term is that that is a Hunyadi water.

X Q. 64. I want your personal experience; I want to know whether if I go to your store and demand a bottle of Hunyadi water you would give me a bottle of Apenti water?

A. No.

X Q. 65. You would not?

A. No, sir.

X Q. 66. And you wouldn't give us a bottle of Franz Joseph water?

A. No, sir.

X Q. 67. You distinguish between those waters and the others which have the name Hunyadi on the label?

A. No, we don't distinguish; we make the customer distinguish. We ask him what kind he wants.

721 X Q. 68. Exactly, but you furnish him only one of those bottles which has the name Hunyadi on the label?

A. Whichever he asks for.

X Q. 69. That has been your custom always?

A. As a rule.

X Q. 70. That is, as long as you have testified, seven or eight years?

A. Oh, yes.

X Q. 71. Has it been your impression that there was a certain group of springs which were called Hunyadi, and from which these various waters came?

A. That has been my impression.

X Q. 72. Located at Budapest or somewhere near Budapest?

A. Somewhere in Hungary, yes; where I don't know.

X Q. 73. Do you know how you got that impression?

A. No, I don't know where I got that impression from unless it was hearing from time to time the names of the different Hunyadi waters that have been in the market from time to time. I would associate them, I suppose, in the same way that I associate the names of the different Congress waters by the names of the springs, that there must be numerous springs there in order to produce numerous waters.

X Q. 74. You inferred from the fact that there are several such waters sold in the market under that name that they have something in common with each other?

A. Yes, sir.

X Q. 75. Something more than the simple similarity of names?

A. Yes, that there must be a variety of springs there.

X Q. 76. At a certain locality?

A. That is the idea.

X Q. 77. That is what you infer from the similarity of the names?

A. That is my impression, yes.

X Q. 78. Then if you should be told that some of these so-called Hunyadi waters come from the remote parts of Hungary, that would rather surprise you, would it not?

A. I would not expect it, no.

X Q. 79. (Showing witness Aesculap bottle.) Mr. Scherer has testified that he was unable to sell this Aesculap water of which
722 a bottle has been shown to you, and that he changed its label to Hunyadi Aesculap, and made it of a blue and red color similar to that of Saxlehner; would you sell such red and blue Aesculap water as Hunyadi water?

A. If it had the name Hunyadi on.

X Q. 80. Then you would sell the water by whatever you found on the label?

A. Why, certainly, the same as we sell all the other articles we have in the store, by the label.

X Q. —. You go by the labels?

A. Yes, sir.

X Q. 82. If the water, wherever it comes from, has the name Hunyadi on the label, you call it Hunyadi water?

A. That is the only way we have to understand.

X Q. 83. You have no other means of finding out the source of those waters?

A. No, sir.

(Signature waived.)

ALFRED H. KENNEDY, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. State your name, age, residence and occupation?

A. Alfred H. Kennedy; age, 47; Newark, New Jersey; proprietary medicines.

Q. 2. What is the name of the firm?

A. The Charles N. Crittenton Company.

Q. 3. Are you one of the company?

A. Yes, sir.

Q. 4. How long have you been connected with the company?

A. Ever since its organization about six years, and then with Mr. Crittenton prior to that near 33 years.

Q. 5. Has your company and its predecessor dealt largely in mineral waters?

A. Well, we have handled them probably not quite as largely as some of the grocery houses, but we carry a pretty good stock, take them all together.

Q. 6. And the Crittenton Company is one of the largest dealers in proprietary medicines in the country?

A. Yes, sir; we are the largest exclusively proprietary medicine house.

723 Q. 7. How many Hunyadi waters has the present company and its predecessor dealt in during the last eight years?

A. I don't know; probably seven or eight of them.

Q. 8. Please give their names?

A. The Hunyadi Janos, the Hunyadi Laszlo, the Lajos, the Matyas, the Arpad; that is all that I can recall at present.

Q. 9. The Bela?

A. The Bela, yes, sir. I remember that one.

Q. 10. These labels and these waters have had in common the name Hunyadi distinguished from each other by their suffixes, Lajos, Matyas, Arpad, Laszlo and Bela?

A. Yes, sir.

Q. 11. And these labels have been in a tripartite or threefold division, the center of which was red with two blue wings?

A. To the best of my belief, yes.

Q. 12. If anybody gives you an order for Hunyadi water how do you fill it?

A. I will generally find out what they want, what particular brand they want.

Q. 13. And you find this out by asking them to specify which they want?

A. Yes, sir.

Q. 14. And if they specify Hunyadi Janos or Hunyadi Matyas or Arpad, Laszlo or Lajos, you have filled the order with that specific water?

A. Up until recently we have.

Q. 15. But if they still decline to specify, how would you fill the orders?

A. We wouldn't be apt to have an order come that way. If we asked a customer what kind he wanted he would be very apt to specify.

Q. 16. These waters have been distinguished then, as I understand you, by the specific terms Hunyadi Lajos, Hunyadi Arpad, Hunyadi Bela, Hunyadi Laszlo and Hunyadi Matyas; am I correct?

A. Yes, sir.

Q. 17. But they have all been classed as Hunyadi waters, have they not?

Mr. KNAUTH: Objected to as incompetent.

724 A. Yes, sir.

Q. 18. What is your understanding, so far as you know the understanding of the trade with regard to the meaning of the word Hunyadi?

Mr. KNAUTH: Same objection.

A. It is a general term applied to waters coming from a city.

Q. 19. What city is that?

A. I used to think myself it was a city called Hunyadi, but I have since learned it is something different.

Q. 20. What is that something different?

A. It comes from a city in Hungary.

Q. 21. And the name of that city is what?

A. I think Budapest.

Q. 22. What do you understand by the suffix name Arpad, Janos, Laszlo, Lajos and Matyas in connection with the word Hunyadi?

A. I thought they came from different springs, the same as would be the case at Saratoga; they have six or seven different springs there and some are called Saratoga Kissengen, some Saratoga Vichy and some Saratoga Carlsbad, and I presumed the same term was applied to Hunyadi.

Cross-examined by Mr. KNAUTH:

X Q. 23. Does your company deal with the retail druggists or do you sell directly to the public?

A. To the retail druggists. Well, if some one was to come in and ask for a bottle, we would be apt to give it to him, but that would be a very rare occurrence; I don't suppose we would sell two bottles of water a year at retail.

X Q. 24. You do not attend to any sale at retail yourself?

A. No, sir.

X Q. 25. The orders which came to your company would therefore probably come either from retail druggists or from grocers or similar people who again trade in the articles?

A. They would come from the druggists because we don't
725 sell any mineral waters to the grocery trade at all; they don't come to us.

X Q. 26. So they come all together from retail druggists?

A. Mostly always; you see our trade is mostly local, and the grocery trade go to Park & Tilford, or Acker, Merrall or some other people.

X Q. 27. And the retail druggist specifies what kind of water he wants?

A. Yes, sir, or else we have found out what kind they want.

X Q. 28. And there is good reason for specifying because the prices are different?

A. Yes, sir.

X Q. 29. They are quite different, are they not?

A. Yes, sir.

X Q. 30. The Hunyadi Janos is the most expensive?

A. Yes, sir.

X Q. 31. And the others vary in price?

A. The others vary in price.

X Q. 32. But they are all lower?

A. All of them are lower than the Janos; yes, sir.

X Q. 33. You say that until recently you have filled orders for the other waters; have you made any change?

A. Only because he spoke of two or three that we haven't handled in two or three years. He spoke of Bela, and I didn't want to say

yes, when we haven't had Bela for, I think, three or four or five years.

X Q. 34. Are you still selling Hunyadi Lajos water?

A. I think so; I think we have got some Hunyadi Lajos water.

X Q. 35. Are you still selling it under the same blue and red label?

A. I wouldn't be positive about the label because I haven't seen it. No, I will take that back; I think the Lajos people changed their name; I think they put a new label on it.

X Q. 36. With the name Lajos on it instead of Hunyadi Lajos?

A. I don't know what was on it, but I understand there was a change. I couldn't tell you only from hearsay; I haven't seen the bottle.

X Q. 37. You are not selling Hunyadi Arpad any more?

A. No, sir; I have not for some time.

726 X Q. 38. And you are not selling Hunyadi Lajos water?

A. No, sir.

X Q. 39. But you are still selling Hunyada Matyas and Hunyadi Janos?

A. Yes, sir.

X Q. 40. How do you know that the name Hunyadi applies to the city of Buda-Pesth?

A. That is my impression; I got it into my mind the same as I did with Saratoga. There was a lot of springs there. At first, for a while, I did think that the word Hunyadi applied to the name of a city, but latterly, in reading a label some time ago, I found that it was springs, and that it came from a city called Buda-Pesth.

X Q. 41. Then this inference which you draw as to the meaning of the name was simply drawn from the names which you found on the labels?

A. Yes.

X Q. 42. Were you ever told where these came from?

A. No; I wasn't told. I have seen it on the labels that it comes from Buda-Pesth, and I know that Buda-Pesth is in Hungary.

X Q. 43. Have you ever seen a bottle of Hunyadi Vilmos water?

A. Not to my knowledge.

X Q. 44. You don't know that?

A. No, sir.

X Q. 45. How long have you known the Hunyadi Janos water?

A. Just about ten years, if not more.

X Q. 46. Ten years?

A. I couldn't tell exactly.

X Q. 47. Have you known it twenty years?

A. I couldn't tell for a certainty. The only way I can be positive as to how long I have known it is if I have got a record of it in my cost book.

X Q. 48. You have no distinct recollection?

A. No distinct recollection, but I should judge it was quite a while, ten or twelve years or more.

X Q. 49. Are you also selling a Hunyadi salt?

A. Yes, sir.

X Q. 50. Do you know where that comes from?
A. St. Louis.
X Q. 51. Why doesn't it come from Buda-Pesth?
A. I don't know.
X Q. 52. Do you know where it is made?
A. I believe that is made in St. Louis.
727 X Q. 53. Made from Hunyadi water?
A. That I don't know.
X Q. 54. You never inquired about it?
A. No, sir.
X Q. 55. Since when are you selling it?
A. I should judge about 18 months.
X Q. 56. If your impression was that the name Hunyadi denoted Buda-Pesth, why did you not inquire as to this salt coming from St. Louis?
A. I don't know why I didn't inquire. It would be hardly worth my while, or any one engaged in the business that we are in, to inquire the reasons why they put different names on different medicines.
X Q. 57. You don't inquire into that?
A. No, sir; we do not. That would keep us busy if we started in to do that.
X Q. 58. You sell what is offered to you, and what can be sold again at a profit?
A. Yes, sir.
X Q. 59. And you leave the name to the parties who offer it?
A. Yes, sir; it isn't within our province to find that out.
X Q. 60. And you have no means to find out?
A. No, sir.

Redirect by Mr. COE:

R. D. Q. 61. You say you have known the Hunyadi Janos about twelve years?
A. It may be longer than that.
R. D. Q. 62. When did you first know the Hunyadi Arpad?
A. Well, I think they all came out about the same time.

Signature waived.

Counsel for defendants offers in evidence translations of Defendant's Exhibit Laszlo Contract Nos. 1 and 2, and they are marked "Defendant's Exhibit Laszlo Contract No. 1, English Translation," and "Defendant's Exhibit Laszlo Contract No. 2, English Translation, March 8, 1898, J. A. S., ex'r."

728 Counsel for defendants offers in evidence an uncertified copy of trade-mark No. 5144, registered September 11, 1887, in United States Patent Office, to Andreas Saxlehner, for trade-mark for mineral water, and the same is marked "Defendant's Exhibit Hunyadi Janos 1877 U. S. Trade-mark, March 8, 1898, J. A. S., ex'r."

Counsel for complainant admits said trade-mark with the same

force and effect as if certified, subject to comparison with a properly certified copy.

Adjourned to Wednesday, March 9, 1898, at 1.30 p. m.

SAXLEHNER
v.
EISNER.

NEW YORK, *March* 9, 1898.

Met pursuant to adjournment.
Present: Counsel as before.

HENRY MARQUET, sworn and examined as a witness for defendants, testified as follows:

Direct examination by Mr. COE:

Q. 1. State your name, age, residence and occupation.

A. Henry Marquet; age, 24; residence, 73 South Washington square; occupation, drug clerk. I attend to the drug store in my father's absence.

Q. 2. Where are you employed and where do you attend to the drug store in your father's absence?

A. 142 Bleecker street.

Q. 3. What is the pharmacy called?

A. Marquet's drug store.

Q. 4. Any other name?

A. Well, we have signs outside, French pharmacy, Italian pharmacy, Spanish pharmacy—different signs in order to indicate the different languages we speak there.

Q. 5. Your father is named Louis Marquet?

A. Yes, sir.

729 Q. 6. Is he the defendant in a suit brought about a year ago against him by Emilie Saxlehner?

A. Yes, sir.

Q. 7. What is your father's occupation?

A. Physician and druggist.

Q. 8. How long have you been employed and been an attendant at your father's store at this place?

A. Ten or twelve years, since I have been able to know something about the business.

Q. 9. During the last seven years have you dealt in and sold Hunyadi waters?

A. Yes, sir.

Q. 10. Which Hunyadi waters?

A. Hunyadi Janos and Hunyadi Matyas.

Q. 11. And those are the only ones?

A. Yes, sir.

Q. 12. When a person or customer has come into the store during the last seven or eight years and called for or ordered Hunyadi water, what have you given him?

A. I would ask him whether he wanted the Hunyadi Janos or

the Hunyadi Matyas if he had any choice, and if he had none, whatever I would have in stock I would give him.

Q. 13. But if he asked for Hunyadi Janos?

A. He would certainly have it.

Q. 14. And if he asked for Hunyadi Matyas?

A. He would have it.

Q. 15. And the two waters you so dealt in were distinguished by their suffixes or last or second names?

A. Yes, sir.

Q. 16. Look at the bottle now shown you, marked Complainant's Exhibit 2 Former Bottle, and state whether that represents as to labels, bottles and capsules the Hunyadi Janos you have sold during the last seven years?

A. It looks to me like it; yes, sir.

Q. 17. Look at the bottle now shown you marked Complainant's Exhibit B, and state whether as to labels, capsules and bottles it represents the bottles of Hunyadi Matyas you have sold?

A. Yes, sir; that is the Hunyadi Matyas.

Q. 18. Do you remember whether, during the whole seven
730 years you have sold the Hunyadi Matyas, it always had on the Seal brand?

A. Yes, sir; to my best knowledge it always had it.

Q. 19. About the main label you are positive that it is the same main label and style?

A. Yes, sir.

Q. 20. Have you read the testimony of Samuel Ginsberg, given on the part of the complainant, Emilie Saxlehner, in the suit against the Eisner & Mendelson Company and against Louis Marquet, in which he speaks of calling at your father's pharmacy on the 15th of February, 1897, at 8 o'clock in the evening, and then states substantially that at that call he presented a slip of paper on which was marked "One Bottle Hunyadi Janos," and at the same time asked for a bottle of Hunyadi Janos water, and the person who filled this order both verbal and written was a short man with red hair or red beard. Can you state who were employed at your father's drug store on the 15th of February, 1897?

A. Yes, sir.

Q. 21. Who were they?

A. There was a lady there, myself, my father and a clerk, a very tall man dark complexioned.

Q. 22. Large man?

A. A large man, a man weighing fully 190 pounds.

Q. 23. Is he living at the present time?

A. No, sir.

Q. 24. When did he die?

A. He died in the month of July, if I am not mistaken.

Q. 25. July, 1897?

A. Yes, sir.

Q. 26. Did your father at that time have any man in his employ answering the description given by Ginsberg—a short man with reddish hair or reddish beard?

A. No, sir.

Q. 27. You are positive about that?

A. Positive.

Q. 28. What sort of a looking man is your father?

A. My father is a man about five feet seven and a half or five feet eight, gray.

Q. 29. A man of about what age?

A. About fifty-five or fifty-eight, fifty-six or fifty-seven.

Q. 30. He has no red hair?

A. No, sir.

Q. 31. And the lady?

A. Dark complexion.

731 Q. 32. Is she your mother or aunt?

A. Aunt.

Q. 33. During the month of February, 1897, did you have charge of the store principally?

A. Yes, sir.

Q. 34. At what hours were you present?

A. Seven in the morning until closing hours.

Q. 35. And you are sure that no such transaction as Ginsberg has stated took place on the 15th of February?

A. Positive.

Q. 36. What time did you close in the month of February, 1897?

A. We never closed earlier than eleven o'clock at night.

Q. 37. Have you read the testimony of Samuel Shulman, so far as he says he visited your father's pharmacy on the 12th day of February, 1897, about three o'clock in the afternoon?

A. Yes, sir.

Q. 38. At that time who was employed there?

A. The same man.

Q. 39. And at that time you had no man in your employ or waiting or tending on the pharmacy who answers to the description given by Shulman, namely, a short man with red hair, did you?

A. No, sir.

Q. 40. You are absolutely sure of that?

A. Positive.

Q. 41. At three o'clock in the afternoon what was your custom as to being in the store?

A. Always there.

Q. 42. What instructions have your father and yourself given to the other two attendants in the store as to the sale of Hunyadi waters?

A. Always give the instructions to make the distinction when they come in and ask for Hunyadi Janos to give them Hunyadi Janos and not even mention Hunyadi Matyas; if they called for Hunyadi Matyas we would give them Hunyadi Matyas and not even mention Hunyadi Janos. We would give a customer just what he called for.

Cross-examined by Mr. KNAUTH:

732 X Q. 43. Is your father's drug store situated at the corner of West Broadway and Bleecker street in New York city?

A. It is.

X Q. 44. At what price do you sell the Hunyadi Janos water?

A. Twenty-five cents.

X Q. 45. At what price do you sell the Hunyadi Matyas water?

A. Twenty-five cents.

X Q. 46. Have you always sold the two waters at the same price?

A. We have.

X Q. 47. At what price do you purchase the Hunyadi Janos water?

A. That I don't exactly remember; that I couldn't exactly say unless I looked at the bills.

X Q. 48. At what price do you purchase the Hunyadi Matyas water?

A. I don't know unless I look at the bills.

X Q. 49. Do you know Samuel Ginsberg, whose testimony you say you have read?

A. I do not.

X Q. 50. Do you know Samuel Shulman, whose testimony you say you have read?

A. I do not.

X Q. 51. Have you any recollection of any person calling at your father's drug store in February, 1897, and showing you a slip of yellow paper on which the words "One bottle Hunyadi Janos" were written?

A. No, sir.

X Q. 52. When do you close the drug store?

A. Eleven o'clock at night.

X Q. 53. Then you mean to say that you are in attendance at the drug store from seven o'clock in the morning until eleven o'clock at night continuously?

A. Except at the noon hour when I go to my dinner.

X Q. 54. Is the noon hour the only time at which you are absent from the drug store on any occasion?

A. I am pretty near always there.

X Q. 55. I am asking you whether that is the only time at which you are absent from the drug store.

A. Yes, sir.

X Q. 56. You are never absent from the drug store?

A. Except Sundays.

733 X Q. 57. Otherwise you mean to testify that for every day in the week you are at the drug store at every hour from seven in the morning until eleven o'clock at night at all hours except the noon hour?

A. Yes, sir.

X Q. 58. Do you take any evening meal?

A. I have it brought to the store.

X Q. 59. Where do you take it?

A. They bring it in the office.
X Q. 60. Where do you take your meal?
A. In the office, behind the prescription counter.
X Q. 61. How large is your office or drug store?
A. It is an ordinary-sized store.
X Q. 62. Can you give the dimensions?
A. I don't think I could give the accurate dimensions; I ha never measured them.
X Q. 63. How wide is it?
A. It must be about twenty or twenty-two feet wide.
X Q. 64. And how long is it?
A. 35 or 36 or 37 feet long.
X Q. 65. Have you a soda-water fountain at the drug store?
A. Yes, sir.
X Q. 66. Is that in front of the drug store?
A. It makes part of the counter.
X Q. 67. And then from the soda-water counter you have counter running towards the rear part of the store?
A. We have a counter up to the prescription counter.
X Q. 68. Where is the prescription counter situated?
A. Between the two counters in the middle of the store.
X Q. 69. You mean you have a counter in the rear part of t drug store behind the prescription counter or in the rear of it?
A. No, I have no counter in the rear of the prescription count I have a counter at each side of the prescription counter.
X Q. 70. One at the front of the store and one at the rear?
A. No, on each side of the store and the prescription counter the center, in the back.
X Q. 71. You mean that the prescription counter runs crossw at the back of the store?
A. Yes, sir.
734 X Q. 72. And there is one counter on either side of t store?
A. Yes, sir.
X Q. 73. Where is bitter water sold, over what counter?
A. Bitter water is sold in back of the soda water.
X Q. 74. Clear of the soda-water fountain?
A. Back of the soda-water fountain, nearer the prescripti counter.
X Q. 75. At the side of the prescription counter?
A. Where I have all the scales.
X Q. 76. What have the scales to do with it?
A. I say where I have the scales there, where I weigh out dif ent articles that the customers come and buy.
X Q. 77. Did the clerk of your store attend to the sale of arti in the store?
A. As a rule, but most of his time was the prescriptions.
X Q. 78. Were you attending to prescriptions yourself
A. No, sir.
X Q. 79. Never?
A. No, sir.

X Q. 80. This clerk was a more experienced man than you, an older man?

A. Yes, sir.

X Q. 81. Was the lady whom you have described as your aunt in your father's store in daily attendance during February, 1897?

A. Yes, sir.

X Q. 82. How long were her hours?

A. In fact she had no hours; the majority of times she would be out. She can go out whenever she wants.

X Q. 83. She was in and out in the course of the day?

A. Yes.

X Q. 84. Whom did you have to send out from your drug store when there were articles required from outside?

A. The lady generally does all the buying if it is articles that would be missing in the perfumery department, but the other articles my father does the buying.

X Q. 85. I don't mean the general buying of your articles, but I mean odd articles which are required occasionally in the course of a day, who would be sent out to purchase them?

735 A. I generally have a little boy around there in front of the door or if not I have a man there with a stand; I would send him with a note to get the article that would be missing.

X Q. 86. A man in front of the store?

A. In front of the store; yes, sir, on the Bleecker Street side.

X Q. 87. You never would go out yourself to purchase anything from other drug stores for use in your store?

A. Very seldom.

X Q. 88. But sometimes you do?

A. Very seldom, sir.

X Q. 89. Have you any other duties or occupation except at your father's drug store?

A. I have not.

X Q. 90. Did you have any such occupation or duties in the course of the year 1897?

A. No, sir.

Cross-examination closed.

HENRY MARQUET.

Attest: JOHN A. SHIELDS, *Ex.*

Counsel for defendant offers in evidence a translation of the duly authenticated decision of 1873, No. 8317, already offered by the complainant, and it is marked "Defendant's Exhibit 1873 Hungarian Decision, English Translation, March 9, 1898, J. A. S., ex'r."

CHARLES O. WEISZ, sworn and examined for defendants, tes fies as follows:

(This witness was sworn by a notary public by consent in t absence of the examiner.)

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?
A. Charles O. Weisz, age 36; I live at 668 East 144th street, Ne York city; occupation, buyer.
Q. 2. For whom?
A. McKesson & Robbins, 91 Fulton street.
Q. 3. How long have you been connected with the said firm?
—. About 27 years.
736 Q. 4. Have McKesson & Robbins dealt quite largely mineral waters during the last ten years?
A. Yes, sir.
Q. 5. Please name the Hunyadi mineral waters they have dea in during the last ten years.
A. Arpad, Janos, Laszlo, Bela, Lajos and several others I don remember.
Q. 6. Matyas?
A. Matyas, yes, sir.
Q. 7. How have these waters been distinguished from each oth by the firm of McKesson & Robbins?
A. By the different brands and names.
Q. 8. And by the different names you mean their second nam or suffixes?
A. Yes, by the second name, Hunyadi Lajos or Matyas or wha ever they call it.
Q. 9. If anybody gives you an order for Hunyadi water, how d you fill it?
A. Ask him what he wants.
Q. 10. And they then specify which of these particular waters the want?
A. Yes, sir.
Q. 11. As Hunyadi Matyas, Hunyadi Bela, Hunyadi Janos, etc
A. Yes, sir.
Q. 12. You give them the water they specify?
A. Yes, sir.
Q. 13. Suppose they decline to specify or do not specify, how d you fill the order?
A. In that case we would probably give them whatever we mad the most money on.
Q. 14. Whatever you had in stock?
A. Whatever we made the most money on.
Q. 15. And in stock?
A. Of course, certainly.
Q. 16. And this has been your custom during the last eight years
A. Yes, sir.
Q. 17. Have you had these waters on your price-list and in yo

catalogues during that period, specifying them by the names Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad, Hunyadi Bela, and Hunyadi Laszlo?

Mr. KNAUTH: Objected to as incompetent.

A. Yes, sir.

737 Q. 18. What was your understanding, with your long experience with McKesson & Robbins and your knowledge of the mineral-water trade, of the use or meaning of the term Hunyadi as understood by the dealers in mineral waters?

Mr. KNAUTH: Objected to as incompetent.

A. An aperient water or cathartic.

Q. 19. What does the suffix Arpad, Matyas, Janos, Bela, Lajos and Laszlo mean in the trade according to your understanding?

Mr. KNAUTH: Same objection.

A. I always thought it meant the brand or spring, as near as I knew.

Q. 20. The particular spring from which these waters were supposed to come?

A. I presume so.

Q. You have sold these waters freely during the last eight years in competition with each other?

A. Yes, except some that were withdrawn from the market in the meantime.

Cross-examined by Mr. KNAUTH:

X Q. 22. Do you mean to say that you have sold Hunyadi Lajos for the last eight years?

A. I wouldn't say exactly eight years; no.

X Q. 23. How long did you sell Hunyadi Lajos?

A. I couldn't say; I would have to look that up if you want that right as to the date.

X Q. 24. You don't know?

A. Not right now; no.

X Q. 25. How long did you sell Hunyadi Matyas?

A. I would have to guess at it.

X Q. 26. We don't want your guess; we want your testimony and your recollection.

A. I can't tell exactly the date; it is safe in saying five years, if that is what you want.

X Q. 27. How long did you sell Hunyadi Laszlo?

A. I couldn't say.

X Q. 28. How long did you sell Hunyadi Janos?

A. I should judge 15 or 18 years.

738 X Q. 29. You sold Hunyadi Janos much longer than the other waters, did you not?

A. Yes.

X Q. 30. For a long time the Hunyadi Janos was the only water on the market bearing the name Hunyadi, was it not?

A. To the best of my knowledge, yes.

X Q. 31. To whom does your firm of McKesson & Robbins sell; do you sell to the public or do you sell to retail dealers or druggists?

A. We sell to druggists.

X Q. 32. You don't sell directly to the public?

A. Oh, we might have an occasional order on a private inquiry.

X Q. 33. Do you personally ever sell directly to the public?

A. I have sold a bottle of it; yes.

X Q. 34. That is only occasionally?

A. That is all.

X Q. 35. You said that the name of Hunyadi to you meant an aperient water?

A. I understood it to be; yes.

X Q. 36. Do you mean to say that every aperient water is called Hunyadi?

A. Oh, no; I do not.

X Q. 37. What you meant to say was only that all the Hunyadi waters which you have described were aperient waters?

A. Were aperient waters, not table waters.

X Q. 38. If any person asks you for a bottle of the genuine Hunyadi, what do you give him?

A. I would give him Janos.

X Q. 39. Has that always been your custom?

A. If they ask for genuine; I don't know as we have ever had an order of that kind, but if they ask for it I would give them Hunyadi Janos.

X Q. 40. Because that was the first you knew of as Hunyadi?

A. As far as I know.

X Q. 41. Don't you remember that in previous years the Hunyadi Janos water was commonly sold in this country as Hunyadi water?

A. I have always known it as Hunyadi Janos water.

X Q. 42. You don't know whether it was commonly called Hunyadi water?

A. I presume it was.

739 X Q. 43. Do you know anything about the location of the springs where the Hunyadi Matyas water comes from?

A. I do not; no.

X Q. 44. You don't know whether it comes from a spring called Hunyadi Matyas, do you?

A. No, I don't; I couldn't swear to it.

X Q. 45. You sell it as Hunyadi only because the name Hunyadi Matyas appears on the label?

A. Yes; that is all; we sell all of them for what the label calls for.

X Q. 46. You always go by the labels?

A. Yes, sir.

X Q. 47. If I should bring you a bottle of Hunyadi Aesculap, you would also sell that as Hunyadi Aesculap or as Hunyadi water?

A. Certainly.

X Q. 48. Because that name is on the label?

A. Certainly; that is the only thing we have to go by is the label.

X Q. 49. You never inquire about the right of the parties selling these waters to call the waters by a certain name?

A. No.

X Q. 50. Is that impossible in view of your large business?

A. To ask?

X Q. 51. To inquire, yes?

A. It isn't impossible, no.

X Q. 52. But you don't do it?

A. No.

X Q. 53. You sell whatever is offered to you, and on which you can make a profit?

A. You mean whatever is offered to us?

X Q. 54. Yes.

A. We buy only on demand. If we have a demand for it we buy it; if we don't, we do not.

X Q. 55. You mean if retail druggists send in orders to you for any waters you furnish them?

A. Yes, that is right.

X Q. 56. And you purchase these waters wherever you can get them?

A. Wherever we can buy them the cheapest.

X Q. 57. Did you ever sell any Royal Hungarian bitter water?

A. I can't say, I don't remember that; I don't remember ever having it in the store.

740 X Q. 58. Did you ever sell any Victoria water?

A. Yes, we have had orders for Victoria.

X Q. 59. Under what name did you sell that water?

A. Victoria.

X Q. 60. Was that the name under which it was called for?

A. Yes.

X Q. 61. That was the name under which you sold it?

A. Yes.

X Q. 62. You never called that Hunyadi?

A. I never did.

X Q. 63. You don't know that it was ever called Hunyadi?

A. I don't know, no.

X Q. 64. Did you ever sell any Franz Joseph water?

A. I did.

X Q. 65. Do you know that as a Hungarian bitter water?

A. They call that Franz Joseph water.

X Q. 66. I mean do you know it as a Hungarian bitter water?

A. I know it as an aperient water.

X Q. 67. And that it comes from Hungary?

A. I don't know.

X Q. 68. You sell that only as Franz Joseph water?

A. Yes, sir.

X Q. 69. Has that always been the custom of your firm?

A. Yes, sir.

X Q. 70. And you purchase it as Franz Joseph water?

A. Yes, sir.
X Q. 71. You wouldn't call that Hunyadi water?
A. No, I should not.
X Q. 72. Well, you never called it Hunyadi water, did you?
A. No.

Cross-examination closed.
Signature waived.

ADOLPH E. GEBHARD, sworn and examined for defendants, testified as follows:
(This witness was sworn by a notary public by consent in the absence of the examiner.)

Direct examination by Mr. COE:

741 Q. 1. What is your name, age, residence and occupation?
A. Adolph E. Gebhard; age, 38; residence, 328 West 34th street, and my place of business is 361 8th avenue; occupation, druggist.
Q. 2. How long have you been engaged as a druggist at that location?
A. At that particular location four and a half years.
Q. 3. And previous to that?
A. I have been in the drug business something over twenty years.
Q. 4. In the city of New York?
A. About 13 years in the city of New York.
Q. 5. During the last eight or ten years have you known of Hunyadi waters in the market?
A. I have.
Q. 6. Dealt in and sold them?
A. Yes, sir.
Q. 7. What Hunyadi waters have you known and dealt and sold in?
A. I have known the Arpad water, I have known the Laszlo and the Matyas and the Janos water, and several others that I don't remember that have come into the market and gone.
Q. 8. As I understand you, you have sold the Hunyadi Janos, the Hunyadi Matyas, the Hunyadi Arpad and the Laszlo during the last eight years?
A. Yes, and even prior to that.
Q. 9. At the time they were in the market?
A. Yes.
Q. 10. And you are selling now the Hunyadi Matyas and Hunyadi Janos?
A. Yes, sir.
Q. 11. During this period of seven years or more during which you sold these four Hunyadi waters whenever they were in the market, if a customer or a person called at the store and asked for Hunyadi water, how would you fill the order?
A. I would generally ask them "What kind do you want," knowing that there were several Hunyadis in the market.

Q. 12. And then?

A. Then whatever the customer said, if they wanted any particular brand I would give them that brand, and if not I would sell them that which I had in stock.

Q. 13. Then if they specified Hunyadi Matyas you would give them Hunyadi Matyas, if they specified Hunyadi Janos you
742 would give them Hunyadi Janos, if they specified Arpad you would give them Arpad, and if they specified Hunyadi Laszlo you would give them Hunyadi Laszlo; am I correct?

A. As I would have it in stock, yes—that is, if they asked me for any water not in stock, I would tell them I didn't have it in stock.

Q. 14. And if they didn't care to specify or declined to specify, then as I understand you would give them anything you had in stock?

A. I would give them any water that I had in stock or a water that I would make a reasonable profit on.

Q. 15. What did you understand by the word Hunyadi as applied to these waters which you say you have known during the last seven or eight years?

A. Well, it is a water that is supposed to be imported from Hungary, from Budapest.

Q. 16. And the words Hunyadi Matyas, Hunyadi Janos, Hunyadi Laszlo and Hunyadi Arpad indicate the particular springs?

A. Yes; designate springs.

Cross-examined by Mr. KNAUTH:

X Q. 17. From what spring did you suppose the Hunyadi Matyas water came?

A. Well, from a spring that is known by that particular name, the Matyas spring.

X Q. 18. How long have you known that spring?

A. I have known that spring since I have been in business. I haven't dealt in all the waters previous to that time, but the Matyas water has come into my hands since I have been in business about four and a half years ago.

X Q. 19. What do you know about that spring?

A. I know about it as much as I do about any of them.

X Q. 20. You mean you know nothing about it?

A. I know what I have just answered, that I know it to be an imported water coming from Hungary in the vicinity of Budapest.

X Q. 21. I mean what do you know about that spring?

A. Well, just as much as I do about any of the Hungarian waters.

743 X Q. 22. Do you know that it comes from any spring?

A. It is supposed to be—that is, according to writings, reading up about mineral waters. I know just as much about where it comes from as I do about the Saratoga waters that they come from Saratoga; I have never been at Saratoga.

X Q. 23. You have never seen the spring?

A. No, sir.

X Q. 24. You have never been in Hungary?

A. No, sir.

X Q. 25. You say you have been twenty years in the drug business?

A. I have.

X Q. 26. How long have you known the Hunyadi Janos water?

A. Well, possibly for about thirteen years.

X Q. 27. Not before that time?

A. Well, I had heard of it before that time.

X Q. 28. Had you used it before that time?

A. No, sir.

X Q. 29. Under what name did you know the Hunyadi Janos water at that time?

A. As Hunyadi water.

X Q. 30. Was it demanded by the public under that name?

A. Hunyadi Janos was demanded under the name or general designation Janos; I knew Arpad about the same time I knew Janos water, and as a rule they applied the name Janos or Arpad to the distinctive waters.

X Q. 31. And previous to that time you did not know anything of Hunyadi water?

A. I was located in the West where mineral waters are not very much sold.

X Q. 32. So your knowledge about Hunyadi water does not go back distinctly beyond about thirteen years?

A. Well, I wouldn't say that. I did sell some Hunyadi water when I was in the West eighteen years ago, but I don't remember whether it was Hunyadi Janos water; that I wouldn't swear to.

X Q. 33. Where in the West was that?

A. That was at Big Rapids, Michigan.

X Q. 34. Do you remember how the bottles looked?

744 A. Well, about the same as Hunyadi waters generally do.

X Q. 35. You mean with a red and blue label?

A. Yes, a red and blue label.

X Q. 36. Wasn't that the water which was at that time sold by the Apollinaris Company in this country?

A. I don't think so, because I don't remember coming in contact with the Diamond brand until I lived in the East. In fact, I don't think that Diamond brand was always used.

X Q. 37. You don't know where that Hunyadi water came from which you sold out West?

A. Well, it came from the firm of Flegenheimer Brothers—not Flegenheimer, but Fleischman; either Fleischman or Flegenheimer, Detroit, Michigan.

X Q. 38. That was about eighteen years ago?

A. That was about eighteen years ago.

X Q. 39. You don't remember whether that was Hunyadi Janos or some other water?

A. That I wouldn't swear to.

X Q. 40. Under what name was that water commonly sold?

A. Well, generally sold under bitter water—Hungarian bitter water.

X Q. 41. Was there any other name applied to it?

A. Not that I remember, except Hunyadi.

X Q. 42. Just Hunyadi or Hungarian bitter water?

A. Yes. In fact, our sale was very limited on it and I remember we obtained fifty cents a bottle for it out there.

X Q. 43. Did you give any particular attention at that time to the label?

A. No, I did not, because there was no competition at that time that would particularly attract you to any label or to anything going on in the way of strife between mineral-water people.

X Q. 44. Did you give any particular attention at that time to the name of the water?

A. Well, I wouldn't say that I did. I remember one thing particularly, that there was no Diamond brand upon the water that I sold out there.

745 X Q. 45. And afterwards you found the Diamond brand upon that water?

A. When I came East some years later I found the Diamond brand. I wouldn't say that I even found the Diamond brand when I first came East.

X Q. 46. You found the Diamond brand on the same water then when you came East?

A. I say I am not able to say that the same water was sold in the West as the Diamond brand or that which was known as the Diamond brand later.

X Q. 47. You don't know?

A. I am not sure about that.

By Mr. COE:

R. D. Q. 48. You don't know anything more about the Hunyadi Janos spring than you do about the Hunyadi Matyas spring?

A. I do not.

(Signature waived.)

ALPHONSE LISSNER, sworn and examined by — defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. Alphonse Lissner; age, 31; residence, 165 Market street, Brooklyn; occupation clerk.

Q. 2. In whose employ are you?

A. Eisner & Mendelson Company.

Q. 3. How long have you been in their employ?

A. I have been there since September 22, 1897.

Q. —. At the request of Mr. Eisner of the Eisner & Mendelson Company have you looked up certain advertisements in various papers within the las- two months?

A. Yes, sir. I did, September and October and later on also.

Q. 5. Look at the advertisement now shown you in the issue of the Druggists' Circular of March, 1889, and see whether that is one of the advertisements you so looked up at his request?

A. Yes, sir; that was one of the advertisements I looked
746 up at Mr. Eisner's request, and that is one of the issues I brought home with me.

Q. 6. From where?

A. From the Druggists' Circular office.

Counsel for defendant offers in evidence the colored advertisement produced by the witness in the March 1889, number of the Druggists' Circular and Chemical Gazette, and it is marked Defendant's Exhibit Hunyadi Arpad Colored Advertisement No. 2, March 9, 1898, J. A. S., ex'r.

Mr. KNAUTH: Objected to as unnecessary, being a duplicate of the advertisement already offered in evidence by the defendant.

Q. 7. Did you examine the files of the Druggists' Circular and Chemical Gazette from the month of December, 1888, including that month, up to June, 1892?

A. Yes, sir; I did.

Q. 8. State whether you found in such issues of said paper advertisements like the one marked Hunyadi Advertisement No. 1 and Defendant's Exhibit Hunyadi Arpad Advertisement No. 3?

A. Yes, sir, I did and I prepared a list of them.

Q. 9. Is this the list?

A. This is the list which I wrote myself.

Q. 10. And you wrote that out on the typewriter yourself?

A. Yes, sir; I did.

Q. 11. And that list represents the actual numbers and the pages which you examined on which you found the Hunyadi Arpad advertisement in the Druggists' Circular and Chemical Gazette?

A. Yes, sir.

Counsel for defendants offers in evidence said list and it is marked "Lissner Druggists' Circular List, March 9, 1898, J. A. S., ex'r."

Q. 12. Did you also at Mr. Eisner's request look up advertise-
ments of Hunyadi Matyas in the issues of the Deutsche
747 Americanisch Apotheker Zeitung from and including May, 1890, to and including September, 1891?

A. Yes, sir; I did.

Q. 13. Where did you look them up?

A. I looked them up in the office of the Deutsche Americanisch Apotheker Zeitung.

Q. 14. Look at Defendant's Exhibit Hunyadi Matyas Apothecary Advertisement, and state whether such advertisement represents the advertisement like those you found in the issues of the said paper from and including May, 1890, to and including September, 1891?

A. Yes, sir; this is the advertisement which I found, this and similar ones, all advertising Hunyadi Matyas water.

Q. 15. Did you prepare a typewritten list of the issues of the paper from May, 1890, to September, 1891, showing such advertisement?
A. Yes, sir, I did.
Q. 16. Is this the list I now show you?
A. Yes, sir, this is the list I have prepared and written myself.

Counsel for defendants offers said list in evidence and it is marked Defendant's Exhibit Lissner Zeitung List, March 9, 1898, J. A. S., ex'r.

Q. 17. Did you at Mr. Eisner's request look up any advertisements of the Hunyadi Arpad water in the Medical Record from and including the issue of June 8, 1898, of said paper to and including the issue of March 1, 1890?
A. Yes, sir, I did.
Q. 18. Where did you look up?
A. I have looked the advertisements up in the office of the Medical Record.
Q. 19. Look at the advertisement now shown you marked Defendant's Exhibit Hunyadi Arpad Medical Record Advertisement, and state whether such advertisement represents the advertisements you so looked up in the issues of said Medical Record from and including June 8, 1889, to and including March 1, 1890?
A. Yes, sir, such and similar advertisements of the Hunyadi Arpad water.
748 Q. 20. Did you prepare a typewritten list showing the dates of such issues from and including June 8, 1889, to and including March 1, 1890?
A. Yes, sir; I did.
X Q. 21. Is the list now shown you such list?
A. This is the list.

Defendant's counsel offers in evidence the list produced by the witness, and it is marked Defendant's Exhibit Lissner Medical Record Arpad List, March 9, 1898, J. A. S., ex'r.

Q. 22. Did you also look up at Mr. Eisner's request advertisements of Hunyadi Matyas water in the months of July, August and September, 1890, at the office of the Druggists' Circular?
A. Yes, sir; I did.
Q. 23. And was the advertisement in those numbers like the advertisement now shown you marked Defendant's Exhibit Druggists' Circular, July, 1890, Advertisement?
A. Yes, sir; such and similar advertisements advertising Matyas water in those issues.
Q. 24. Did you prepare a list of advertisements in the Druggists' Circular by Eisner & Mendelson of the Hunyadi Matyas from June, 1892, to June, 1897?
A. Yes, sir; I did.
Q. 25. Is the list now shown you such list showing the months and years of the insertion by the Eisner & Mendelson Company of

advertisements of the Hunyadi Matyas and similar advertisements in the issues of those dates of the Druggists' Circular?

A. Yes, sir.

Q. 26. Where did you look up the advertisements?

A. I looked the advertisements up in the office of the Druggists' Circular.

Q. 27. Did you prepare the list now shown you and typewrite it yourself?

A. Yes, sir; I did.

The list produced by the witness is offered in evidence by defendant's counsel and marked Defendant's Exhibit Lissner Druggists' Circular Matyas List, March 9, 1898, J. A. S., ex'r.

749 Q. 28. Did you, at Mr. Eisner's request, look up advertisements of the Apollinaris Company in the Medical Record from April 6, 1889, to and including December 13, 1890, of said publication?

A. Yes, sir; I did.

Q. 29. When?

A. I looked those up in the office of the Medical Record.

Q. 30. Does the advertisement marked Defendant's Exhibit Apollinaris Hunyadi Advertisement show the advertisement which was so inserted in the issues you looked up during those years?

A. Yes, sir.

Q. 31. Did you prepare a typewritten list of this advertisement and of the days of the month and years from and including April 6, 1889, to December 13, 1890, of said Medical Record?

A. Yes, sir; I did.

Q. 32. Is this the list I now show you (showing witness list)?

A. Yes, sir.

The list referred to so prepared by the witness is offered in evidence by defendant's counsel and it is marked Defendant's Exhibit Lissner Medical Record Apollinaris List, March 9, 1898, J. A. S., ex'r.

Q. 33. Did you also, at Mr. Eisner's request, look up any advertisements of the Apollinaris Company in the Medical Record during the year 1893?

A. Yes, sir; I did.

Q. 34. Is the advertisement marked Defendant's Exhibit Apollinaris Hunyadi Medical Record Advertisement now shown you, dated April 8, 1893, one of such advertisements you so looked up?

Mr. KNAUTH: Objected to as immaterial, irrelevant, and incompetent.

A. Yes, sir.

Q. 35. Where did you look it up?

Mr. KNAUTH: Same objection.

750 A. I looked it up in the office of the Medical Record.

Q. 36. Did you prepare a list of this advertisement inserted in the Medical Record for the year 1893?

Mr. KNAUTH: Same objection.

A. Yes, sir; I did.

Q. 37. And is the list I now show you such list?

Mr. KNAUTH: Same objection.

A. This is the list; yes, sir.

Counsel for defendant offers in evidence the list of the 1893 Medical Record advertisements and the same is marked "Defendant's Exhibit Lissner 1893 Medical Record Hunyadi Advertisement, March 9, 1898, J. A. S., ex'r."

Mr. KNAUTH: Same objection.

Q. 38. Did you at Mr. Eisner's request look up advertisements of the Hunyadi Matyas water from November 1, 1890, to and including May 1, 1897, in the publication called the Grocers' Monthly Review?

A. Yes, sir; I did.

Q. 39. Where?

A. I looked those advertisements up in the office of the Grocers' Monthly Review.

Q. 40. Where is that office?

A. It is on Hudson street, corner of North Moore.

Q. 41. Look at the advertisement now shown you marked Defendant's Exhibit Hunyadi Matyas Grocers' Advertisement and state whether this and similar advertisements appeared in the Grocers' Monthly Review from 1891 to 1897?

A. Yes, sir; such and similar advertisements appeared in the Grocers' Monthly Review from November 1, 1891, to May 1, 1897.

Q. 42. Did you prepare a list of such advertisements typewritten by you?

A. Yes, sir.

Q. 43. Is the list now shown you such a list?

A. Yes, sir.

751 Counsel for defendants offers said list in evidence and it is marked "Defendant's Exhibit Lissner's Grocers' Matyas List, March 9, 1898, J. A. S., ex'r."

Cross-examined by Mr. KNAUTH:

X Q. 44. You have stated that the advertisements like Defendant's Exhibit Hunyadi Arpad Advertisement- No. 1 and No. 3 appeared in the issues of the Druggists' Circular and Chemical Gazette indicated on the list marked Defendant's Exhibit Lissner Druggists' Circular List. Did you mean to say that both these advertisements appeared in each issue of that paper which you have indicated in the list?

A. No, sir.

X Q. 45. Did you mean to say that in the paper indicated in your list sometimes one of these advertisements appeared and at other times the other?

A. Yes, sir.

X Q. 46. Can you state how often the advertisement No. 1 appeared and how often the advertisement No. 2?

A. No, sir.

X Q. 47. You have said that the issues of this paper called the Druggists' Circular and Chemical Gazette which are indicated in your list contained advertisements such as the two advertisements to which counsel referred you or similar advertisements?

A. Yes, sir.

X Q. 48. Then you do not mean to say that the issues of this paper always contained the same advertisements in words?

A. They did not contain either one or the other of those advertisements which I gave you.

X Q. 49. Did they contain the same advertisements in the same words as appear upon the specimens here before us?

A. I believe they do, one or the other.

X Q. 50. In each instance?

A. I believe they do; yes, sir.

X Q. 51. Have you compared the advertisement in each issue so as to be able to testify that the advertisement was the same
752 in words as these two advertisements Nos. 1 and 3 or either of them?

A. No, sir; I have not.

X Q. 52. You have simply glanced at the advertisements, I suppose?

A. I have looked them up and picked them out.

X Q. 53. By picking out you mean you have taken a memorandum of it?

A. The advertisement; yes, sir.

X Q. 54. You didn't pick out the advertisements bodily from the paper, did you?

A. No, sir; I did not.

X Q. 55. I notice that the advertisement No. 1 contains a reference to Hunyadi Janos. Do you remember whether each of the advertisements of that kind which you found in the Druggists' Circular and Chemical Gazette contained that reference to Hunyadi Janos?

A. I do not know.

X Q. 56. This advertisement also contains a reference to a water called Æsculap water under the advertisement of December, 1888, No. 1; do you remember whether the advertisements specified in your list contained this reference to Æsculap?

A. Some of them might have contained it and others not.

X Q. 57. What is your recollection on the subject?

A. I did not look up the meaning of the advertisement, the words of it; I simply looked up the advertisement and I do not remember what they said.

X Q. 58. I notice that this same advertisement of December, 1888, is signed by P. Scherer & Co. Can you state whether the other advertisements in this list which you have produced also contained the name of P. Scherer & Co.?

A. Up to May, 1892, they did contain the name of P. Scherer & Co.

X Q. 59. That is your recollection?

A. That is my recollection.

X Q. 60. Did any such advertisement like Defendant's Exhibit Hunyadi Arpad Advertisement No. 1 appear with the name of the Eisner & Mendelson Company signed to it?

A. I believe that it did appear, but I couldn't testify to it.

X Q. 61. I notice that your list ends with June, 1892; am
753 I right in supposing that if the name of the Eisner & Mendelson Company appears in any of those advertisements like No. 1, it was only in the one advertisement of June, 1892?

A. Yes, sir; I believe so.

X Q. 62. I asked you whether the name of the Eisner & Mendelson Company appears on any of the advertisements in your list like this No. 1.

A. I do not think it does.

X Q. 63. I notice that your list contains at the end a reference to to June, 1892, this being the last item of the list. Do you know whether that refers to an advertisement like Hunyadi Arpad advertisement No. 1?

A. No, I don't remember.

X Q. 64. Do you know this Druggists' Circular and Chemical Gazette?

A. Yes, sir; I do know it.

X Q. 65. Is it a trade paper?

A. Yes, sir; it is.

X Q. 66. Now coming to your list, which has been marked before Lissner's Zeitung list, did you mean to testify that the advertisement marked Defendant's Exhibit Hunyadi Matyas Apothecary Advertisement in words and manner shown on that page is contained in the various issues of this Gazette which are indicated in your list?

A. I believe that the same advertisement appeared in all the issues I mentioned on my list, but I could not testify to it; there might be a slight change in the advertisement.

X Q. 67. Do you remember whether each one of these advertisements published from May, 1890, until September, 1891, in this Gazette contained a reference to Hunyadi Janos as appearing on Defendant's Exhibit Apothecary Advertisement?

A. I do not remember; they all advertised Hunyadi Matyas.

Mr. KNAUTH: I object to the last part of the answer as irresponsive.

X Q. 68. Do you remember whether each one of these advertisements like the apothecary advertisement contained a certifi-
754 cate of Dr. Charles Tornay of August, 1862?

A. No, sir; I do not remember.

X Q. 69. Do you know whether each of them contained a certificate by Baron von Rokitansky, dated November 20, 1877?

A. I do not remember.

X Q. 70. Do you remember whether each copy of this advertise

ment contained the picture of a white label as appearing on this exhibit?

A. I believe it did.

X Q. 71. Do you remember whether each one of these advertisements contained the comparative analyses of Hunyadi Matyas, Hunyadi Janos and Hunyadi Arpad as appearing on this advertisement?

A. I do not remember.

X Q. 72. Then your recollection only is that something like this advertisement was contained in the issues of that paper which you have given in your list, Lissner's Zeitung List?

A. Yes, sir.

X Q. 73. Now let us take up your list marked Defendant's Exhibit Medical Record Arpad List. Did you mean to testify that the same advertisement as shown by Defendant's Exhibit Hunyadi Arpad Medical Record Advertisement, was contained in each issue of that paper which is indicated in your list?

A. Yes, sir.

X Q. 74. Exactly the same?

A. Exactly the same.

X Q. 75. Are you sure of it?

A. Yes, sir.

X Q. 76. Were any of these advertisements like the one which I have just referred to signed by the Eisner & Mendelson Company?

A. No, sir.

X Q. 77. Going back once more to Defendant's Exhibit Lissner Zeitung List, I find that that advertisement of Hunyadi Matyas water contains a chemical analysis of Hunyadi Matyas, of Hunyadi Janos and of Hunyadi Arpad, with the heading "Chemical analysis of the several Hunyadi springs," and the words underneath "Hunyadi Matyas water is therefore the best of all imported springs," in prominent type. Do you remember whether these words and analyses were contained in the various advertisements indicated in your list, Lissner's Zeitung List?

A. No, sir; I do not remember.

755 X Q. 78. Do you understand German?

A. Yes, sir; I do.

X Q. 79. Was what I translated from Defendant's Exhibit Hunyadi Matyas Apothecary Advertisement correctly translated?

A. Yes, sir.

X Q. 80. Now, look at Defendant's Exhibit Lissner Druggists' Circular Matyas List; do you remember whether the various certificates of Charles Tornay, August, 1862; Joseph Riedl, of July, 1872; Francis Brunner, of May, 1862; F. Lorenser, of April 11, 1865, and Rotikansky, of November, 1877, were contained in each issue of this paper, as indicated on your list?

A. No, sir; I do not remember.

X Q. 81. Do you remember whether any of them were?

A. It must have been in this issue of July, 1890.

X Q. 82. Do you remember whether these same certificates were reprinted in any other issue indicated on your list?

A. No, sir; I don't remember.

X Q. 83. Do you remember whether the comparative analyses of Hunyadi Matyas, Hunyadi Janos, Hunyadi Arpad, appearing on this advertisement, were also in the other advertisements which you have indicated on your list?

A. I believe that they were in some of them.

X Q. 84. You don't remember in all?

A. Whether they were in all or how many, I do not remember.

X Q. 85. Do you remember whether the words "Hunyadi Matyas is the strongest of all aperient Hunyadi waters," signed with the name of the Eisner & Mendelson Co., were on each of the advertisements?

A. They were no doubt on some of them, but I do not remember on how many, and on which they were.

X Q. 86. Then you have only a general recollection of the advertisement?

A. Yes, sir.

X Q. 87. Now, please look at Defendant's Exhibit Lissner Grocers' Matyas List, and state whether or not the same advertisement as appears on the page marked Defendant's Exhibit Hunyadi Matyas Grocers' Advertisement, appeared in each issue of
756 the Grocers' Monthly Review, which is indicated in your lists?

A. No, sir.

X Q. 88. It did not?

A. Not the same.

X Q. 89. You are sure of that?

A. I am sure it was not the same; it was similar.

X Q. 90. What was in this which was similar, but not the same?

A. That I do not remember; it was an advertisement of Hunyadi Matyas water.

X Q. 91. You can't remember the contents?

A. No; I can't remember; they were similar; that I do remember.

X Q. 92. Were all of these papers which you have examined trade papers?

A. Yes, sir; they were all trade papers.

X Q. 93. Do you know whether they appeared monthly or weekly?

A. Some of them appeared monthly and others weekly.

Redirect by Mr. COE:

R. D. Q. 94. You do not mean to say that the Medical Record, which you referred to, was a trade paper, do you?

A. It was a professional paper.

Recross by Mr. KNAUTH:

R. X Q. 95. Do you mean the paper in which the advertisement of the Apollinaris Company appeared?

A. Yes, sir.

R. X Q. 96. And one list of advertisements of Hunyadi Arpad?
A. Yes, sir.

Signature waived.

Adjourned to Thursday, March 10, 1898, at 2 p. m.

757 SAXLEHNER
vs.
EISNER ET AL.

NEW YORK, *March* 10, 1898—2 p. m.

Met pursuant to adjournment.
Present: Counsel as before.

RUDOLPH GIES, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?
A. My name is Rudolph Gies; residence, 270 West 25th street; occupation, lecture assistant at the New York College of Pharmacy, 115 West 68th street; age, twenty-seven.
Q. 2. Do you keep a drug store?
A. I do not now; no, sir.
Q. 3. Did you in the month of February, 1897?
A. Yes, sir; I did.
Q. 4. And where was that drug store?
A. At 396 Third avenue.
Q. 5. Are you the defendant in the suit of Emilie Saxlehner vs. Rudolph Gies?
A. I am.
Q. 6. Have you had read to you the testimony of Bernard Osterman so far as it relates to a claimed visit which he states he made at your store, No. 396 Third avenue, between the 1st and the 5th of February?
A. I have.
Q. 7. Did you ever sell to him or to any one in that month or year a bottle of Hunyadi Matyas water when he asked you for a bottle of Hunyadi with a red diamond on it?
A. I did not.
Q. 8. How many clerks did you have at that time, on February, 1897?
A. Only one clerk. Of course, I had a colored porter, but he was not a clerk.
Q. 9. Mr. Osterman states that the person who waited on him at his visit to your drug store between the 1st and the 5th of February, 1897, was a young man, about eighteen or twenty years old, a blond man, a middle-sized man, and that he guesses he had a little
758 moustache. Was this clerk who you say was the only clerk you had in your employ in the month of February, 1897, a man of such a description?

A. Decidedly not.

Q. 10. What sort of a looking man was he?

A. He was a man about five feet three or four, of medium build, I mean as to stoutness or as to corpulency; very black hair and smooth face.

Q. 11. You do not fit that description yourself, do you?

A. I should hope not; I don't seem to.

Q. 12. Have you also had read to you the testimony of Samuel Shulman so far as it relates to a visit which he claims to have made at your store No. 396 Third avenue, on or about the 11th or 12th of February, 1897?

A. Yes, I have.

Q. 13. He states that at that time he handed the person who waited on him a slip of paper and asked for Hunyadi Janos, Red Diamond, and that he got a bottle of Hunyadi Matyas water. Did you sell to him or to any one else in that month, or ever, to your knowledge a bottle of Hunyadi Matyas for a bottle of Hunyadi Janos, Red Diamond?

A. No, sir.

Q. 14. Do you remember any such transaction?

A. No, sir.

Q. 15. You are positive it did not take place with you?

A. Yes, sir.

Q. 16. Mr. Shulman further describes the person who waited on him on the occasion I have spoken of, on the 11th or 12th of February, 1897, as being a short man with a full beard. Did you have any clerk of that description in your employ at that time?

A. No, sir.

Q. 17. The only clerk you had in your employ on the 11th and 12th days of February, 1897, was the clerk you have spoken of?

A. Yes; sir; the only man.

Q. 18. How long were you in the drug business?

A. For myself, do you mean, as proprietor, or the entire time I have been in the business?

Q. 19. Both.

A. Well, I started in the business in August, 1889.

759 Q. 20. Were you employed by anybody then?

A. Yes.

Q. 21. By whom?

A. Thomas E. Fraser.

Q. 22. And after that?

A. I was off and on in his employ all the time, practically, until I started in for myself in 1895—July, 1895.

Q. 23. And that was at 396 Third avenue?

A. Yes, sir.

Q. 24. And you continued there until you sold out?

A. Until I sold out a few days ago.

Q. 25. Have you since the year 1889, been familiar with the various Hunyadis on the market?

A. Yes, sir.

Q. 26. Which Hunyadi did you first know of in or about the year 1889?

A. Well, the first bottle of Hunyadi that I ever sold—of course, when I went in in 1889 I was making up packages and did not sell behind the counter, not until 1890, but the first water I remember selling was Hunyadi Arpad.

Q. 27. And the next water?

A. The next was Janos.

Q. 28. Hunyadi Janos?

A. Yes; Hunyadi Janos.

Q. 29. And you have also sold and dealt in other Hunyadis than those two during the last nine years?

A. Yes, sir.

Q. 30. Please state the names of the waters that you have so sold?

A. Well, the principal one outside of those before mentioned, was Hunyadi Lajos, and Hunyadi Matyas.

Q. 31. During the time that you sold Hunyadi waters, as you have stated, when a customer came to your store or the store where you were employed, and asked for a bottle of Hunyadi water, what did you do?

A. I generally asked him what his pleasure was regarding the various brands on the market, if he had any favorite brand, or if he had any special brand that he desired; that was invariably my question.

Q. 32. And then if he specified Hunyadi Matyas or Hunyadi Janos——

A. He got it—that which he specified he got.

760 Q. 33. And that was your invariable custom?

A. Invariable custom.

Q. 34. And if he asked for the Hunyadi Janos, or Hunyadi Diamond brand, what did you give him?

A. He got Janos.

Q. 35. Why?

A. Why, because that was the brand which had the trade-mark of the diamond, the Apollinaris diamond, and I might add that even after the diamond came off, when the Diamond brand was asked for, I always handed out Janos with the explanation that the diamond was no longer on it, but I presumed that that was the brand that he meant.

Q. 36. What was your understanding during these nine years of what the word "Hunyadi" meant, as applied to mineral waters?

A. I understood it generally as applied to a class of waters, Hungarian bitter waters. That was my understanding of the word "Hunyadi" as a class.

Q. 37. And how are the different waters distinguished from each other?

A. By various names, as I take it.

Q. 38. By various names you mean the suffixes—the second name?

A. The names of the springs, as I understood it. The Janos came

from the Janos springs; the Arpad water came from the Arpad springs; that was my understanding of it all through those years.

Cross-examination by Mr. KNAUTH:

X Q. 39. How old did you say that you are, Mr. Gies?

A. Twenty-seven.

X Q. 40. Did you wear a mustache in February, 1897?

A. I never had enough on my upper lip, sir, to be called a mustache, even if I attempted to grow one.

X Q. 41. Do you flatter yourself that you are remarkably young looking? Are you not?

A. No; in fact, I was always taken to be older than what I am; when I was fifteen years old, people thought I was twenty-one, because I was so large and stout.

761 X Q. 42. You mean by your intellect, rather than by your face?

A. That is as you wish to infer it, sir.

X Q. 43. Do you call your hair blond or brown?

A. I don't think it is even brown; I think it is a very dark brown; that is what I would call it; I don't know.

X Q. 44. You mean as far removed from blond as you can possibly make it?

A. No, I won't say that; black is farther from blond than my hair; still it is not blond.

X Q. 45. Will you please look at the slip of pink paper which has been marked Complainant's Exhibit Gies Receipt, and tell me whether the words written in pencil on that paper are in your handwriting?

A. No, sir; that is not my handwriting.

X Q. 46. Do you know in whose handwriting they are?

A. I cannot say that I do, no, sir.

X Q. 47. Will you please look at the paper which has been offered in evidence and marked Complainant's Exhibit Gies Receipt also of pink color, and state whether the words written in pencil on that paper are in your handwriting?

A. No, sir.

X Q. 48. Can you state in whose handwriting that is?

A. I do not recognize that handwriting at all, sir.

X Q. 49. Where is your store situated?

A. It was situated at 396 Third avenue.

X Q. 50. Don't you find the words 396 Third avenue also written in pencil on one of these two pink slips underneath?

A. Yes, sir.

X Q. 51. Is that not in the same handwriting in which the other words on the pink slip appear, so far as you can judge?

A. No, sir; there is nothing to distinguish whether they are or not.

X Q. 52. You cannot tell at all as to whether they are in the same handwriting or not?

A. I cannot say they are in the same as the other handwriting.

X Q. 53. Can you tell me what the signature in pencil "R. Gies" over this address means, and who wrote it?

A. That is not my signature.

X Q. 54. You don't know whose signature it is?

762 A. No, sir; I cannot recognize it; I never wrote it.

X Q. 55. At what price do you sell Hunyadi Matyas?

A. At what price do I sell it?

X Q. 56. Yes.

A. I sold it at 20 cents for a long while. Of course, that is a rather hard question to answer, because at one time I sold it at 20 cents and at one time I ran it at 18; that I will admit; that is the truth.

X Q. 57. When did you sell it at 18; do you remember?

A. No, sir; I would not like to go on record on that, because I did that when there was a general cut in all Hunyadi waters all around the neighborhood, and I simply did that to meet the cut; they were selling various brands of Hunyadi at 18 cents a bottle, or three for a half, all around the neighborhood, and I did it to meet the cut, but when that was, I cannot swear to it.

X Q. 58. Do you know Bernard Osterman, whose testimony you say you have read?

A. No, sir; I don't know anybody by that name.

X Q. 59. Do you know Samuel Shulman, whose testimony you say you have read?

A. I know no one of that name; no, sir.

X Q. 60. Have you ever employed pink paper like the paper shown by the exhibits, in your drug store?

A. I did have a pink paper, but it was not that shade.

X Q. 61. What shade of pink was it?

A. Well, it was almost onto a red—very much darker; and even—I would like to add in a word now—and even then it was only the first part of the time that I owned the store; I don't know but what it was white that I used during that period of time mentioned by the gentleman who bought Hunyadi.

X Q. 62. Will you swear that it was white?

A. No; I won't swear that it was white; I wouldn't swear that it was pink, either; I know I did not use the pink paper very long.

X Q. 63. Where is that clerk that you employed in your drug store in February, 1897?

A. He is now in business for himself at 102nd street and Manhattan avenue.

763 X Q. 64. What is his name?

A. Morris Manheimer.

X Q. 65. M-a-n-n-h-e-i-m-e-r?

A. It is certainly "n"; whether it is double "n," I would not say.

X Q. 66. At what price did you sell Hunyadi Janos water in February, 1897?

A. 25 cents; never any less.

X Q. 67. Then if these persons went to your store and bought Hunyadi water in February, 1897, at 18 cents, that would not have been Hunyadi Janos water?

A. No.

X Q. 68. Did you sell other water having the name Hunyadi as some part of it but the two waters which you have now named, in February, 1897?

A. No; not at that time; no, sir.

X Q. 69. At that time you sold only Hunyadi Matyas and Hunyadi Janos?

A. As regular stock; certainly if somebody came in I will say that I had an order for Hunyadi Lajos once or twice, which I got specially, but I did not keep it in stock.

X Q. 70. Do you remember selling any Hunyadi Matyas water in February, 1897?

A. Well, I certainly sold Hunyadi Matyas during that time; yes, sir; I don't remember any specific sales, of course.

X Q. 71. Do you call yourself a middle-sized man, or a tall man, or what sized man?

A. That is my answer, sir (the witness stands up); I don't think I am a middle-sized man.

X Q. 72. What would you call yourself?

A. I should call myself a tall man.

X Q. 73. What is your height?

A. Very nearly six feet; about five feet eleven in my shoes, or a little over.

X Q. 74. Will you be good enough to write "One bottle Hunyadi," and your name under it on this white paper?

A. (Witness complies.) If you want to identify that signature, sir, I can show you plenty of bank checks that have it on.

Complainant's counsel offers in evidence this slip which the witness has written, and the same is marked "Complainant's Exhibit Gies Handwriting."

764 X Q. 75. You have stated that Hunyadi meant to you Hungarian bitter waters. Do you mean to say that all Hungarian bitter waters, in your opinion, are called Hunyadi?

A. No, I don't mean to say that, but I mean those on the general market known as Hunyadi, I understood to be bitter waters—only a general class.

X Q. 76. Do you mean to say that all those bitter waters which you sold under the name of Hunyadi, as part of the name, are all Hungarian bitter waters?

A. Well, all Hungarian bitter waters; yes, sir; that is what I mean.

X Q. 77. And there are also other Hungarian bitter waters on the market that are not called Hunyardi, are there not?

A. That I could not say; that I don't know.

X Q. 78. Have you ever sold Franz Joseph?

A. No, sir.

X Q. 79. Have you ever sold Appenta water?

A. Yes, I did.

X Q. 80. Is not that a Hungarian bitter water?

A. Yes, sir; I believe it is.

X Q. 81. Have you ever sold Victoria water?

A. No, sir.

X Q. 82. Have you ever sold Hungaria water?

A. No, sir; not under that title; in regard to Appenta water that did not have any suffix about the name Hunyadi.

X Q. 83. And therefore you did not call it Hunyadi?

A. Well, Hunyadi water, certainly not; it was simply known as Appenta.

X Q. 84. Are these bitter waters always known by the name which they bear on the label?

A. Yes, sir.

X Q. 85. You had no experience in the drug business prior to 1889?

A. No, sir.

X Q. 86. You did not use any Hunyadi Janos water yourself prior to 1889?

—. You mean that I drank it?

X Q. 87. Yes, sir.

A. I never used it either prior or after of any kind—never had to.

765 X Q. 88. Do you know anything of the springs from which these waters come or came, which you sold under the name of Hunyadi?

A. In what respect—that I knew their location?

X Q. 89. Yes, their location, and their character and their ownership?

A. No, sir; except that I believed those Hunyadi waters that had special names came from special springs; that is all I knew by that name; that is all I know about them.

X Q. 90. But you did not know from which spring they came?

A. Well, I presume that a bottle labelled Hunyadi Janos came from the Janos spring, certainly.

X Q. 91. But you did not know what Hunyadi Janos spring that was?

A. No.

X Q. 92. You did not?

A. No.

X Q. 93. And now take, for instance, the Hunyadi Lajos spring; do you know anything about the Hunyadi Lajos spring?

A. No, I didn't know who owned it.

X Q. 94. Do you know that at some time the owner of the Hunyadi Lajos water took that water from one spring which he called Hunyadi Lajos, and afterwards took it from another spring, which he thereupon called Hunyadi Lajos?

A. No, I don't know anything about that.

X Q. 95. Do you know that the owner of the Hunyadi Matyas spring first took the water from one spring which he called Hunyadi Matyas, and afterwards took the water from another spring which he called Hunyadi Matyas?

A. No.

X Q. 96. You don't know anything about those springs?
A. No.

RUDOLPH GIES.

Attest: JOHN A. SHIELDS, *Ex.*

766 DOMINICK A. GREAVEN, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?
A. My name is Dominick A. Greaven; my occupation is druggist; fifty-five years old; residence, 279 West 114th street.
Q. 2. Where is your drug store?
A. World building.
Q. 3. How long have you been a druggist in that location?
A. I have been three years there.
Q. 4. And prior to that?
A. I have been five years in the Sun building with the same firm.
Q. 5. What is the firm?
A. Perry's pharmacy.
Q. 6. During the last eight years have you known the various Hunyadi waters on the market?
A. Yes, sir.
Q. 7. And what Hunyadi waters have you sold and dealt in during the last eight years?
A. Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, and I think Hunyadi Laszlo.
Q. 8. Any others, if you recollect?
A. I cannot recall any more; that is about all.
Q. 9. What has been your custom during the last eight years when a person called or ordered at your drug store a Hunyadi water?
A. Well, found out what they wanted.
Q. 10. How did you find out?
A. Inquire and ask them?
Q. 11. Ask them what?
A. What Hunyadi they wanted.
Q. 12. And then if they specified?
A. Any particular kind that we had, we sold it to them.
Q. 13. That is to say, if they asked for Hunyadi Janos you gave them Hunyadi Janos; if they asked for Hunyadi Arpad, you gave them Hunyadi Arpad, and if they asked for Hunyadi Matyas, you gave them Hunyadi Matyas, if you had it in stock?
A. Yes, sir.
767 Q. 14. And if they asked for Hunyadi Laszlo, you gave that to them?
A. If we had it, yes, sir.
Q. 15. Suppose they declined to specify and still said that they wished a Hunyadi, what would you give them?
A. I would give them any of them.

Q. 16. Any of those you had in stock?
A. Any in stock.

Cross-examination by Mr. KNAUTH:

X Q. 17. How long have you known the Hunyadi Janos?
A. Well, a good many years, I guess; I couldn't exactly tell.
X Q. 18. Have you known it since it was introduced in 1876?
A. Oh, yes.
X Q. 19. By whom was it sold?
A. I think it was by the Apollinaris Limited Company, if I remember right.
X Q. 20. How was that water commonly demanded by the public?
A. Well, I suppose through advertising and through the physicians.
X Q. 21. No, I mean under what name was it usually demanded by the public, by the customers?
A. As Hunyadi or Hunyadi Janos.
X Q. 22. They would either call for a bottle of Hunyadi or a bottle of Hunyadi Janos?
A. I presume so, yes.
X Q. 23. Do you know which name was more frequently used by customers coming into the store?
A. Well, that it was known to the public as Hunyadi water, generally.
X Q. 24. That was its colloquial name?
A. Yes, known as Hunyadi, and I believe so now it is known as Hunyadi water. I see a great many come in and want to get a bottle of Hunyadi, and you try to find out what they want and give it to them.
X Q. 25. You find very frequently, do you not, that your customers do not know anything about the water except that they want Hunyadi water?
A. Hunyadi water, yes, sir.
X Q. 26. That has always been the case?
A. I suppose so. In our house particularly, there is a
768 standing rule to find out what the people want, and let them have it.
X Q. 27. But you find they frequently don't know anything about any particular spring waters?
A. They don't know anything about them.
X Q. 28. You make more profit out of the other waters than out of the Hunyadi Janos, do you not?
A. Yes.
X Q. 29. How long have you known the blue and red label of the Hunyadi Janos water?
A. Well, I suppose I know it since it was first introduced here, since it came on the market.
X Q. 30. During all that time?
A. Yes.

X Q. 31. And the other waters which have been called Hunyadi here all came under similar red and blue labels, did they not?

A. Well, I think they was; I can't recall, but I think there was some distinguishing mark connected with these other waters.

X Q. 32. What was the distinguishing mark?

A. Well, upon my word I don't think I could recall what it was; I think—upon my word I don't think I could tell.

X Q. 33. You mean that one was called Hunyadi Matyas and another Hunyadi Laszlo?

A. Yes, and Hunyadi Arpad.

X Q. 34. That is the way you could distinguish them?

A. Yes.

X Q. 35. Otherwise they were very similar?

A. Yes, sir.

X Q. 36. And similar bottles?

A. Yes; one of them had a cross.

X Q. 37. And you distinguished that by the cross?

A. Well, I really distinguished the water generally by the name written on the label.

Redirect examination by Mr. COE:

R. D. Q. 38. You have stated that one of the waters you distinguished by a cross. I now show you a bottle of Hunyadi Arpad water showing a cross on its centre panel. Do you mean that cross?

769 A. Well, no; I don't know; that is not exactly it. The cross was of a brighter color that was on one of the labels.

R. D. Q. 39. Look at the bottle of Hunyadi Matyas water I now show you and having the red seal. Do you mean that as the identifying mark?

A. No, that is not what exactly strikes me, either.

R. D. Q. 40. Look at the bottle of Hunyadi Janos water with the red diamond on it and state if that is the one you refer to?

A. I guess that is what I had reference to; it is a hard matter to remember a label.

(Signature waived.)

GUSTAVE STRASSBURGER, recalled and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. What is your name, age, residence and occupation?

A. Gustave Strassburger; age, twenty-eight; residence, 21 West 101*th* street; occupation, salesman.

Q. 2. For whom have you been salesman?

A. I was salesman for the P. Sherer Company, and then for the Eisner & Mendelson Company. Previous to that I had no interest in this business.

Q. 3. When did you become salesman for the P. Sherer Company?

A. At the end of 1889, or about the middle of 1889 would be more exact.

Q. 4. How do you identify the date?

A. Well, because I left the college at the beginning of that year, and went there towards the middle of the year.

Q. 5. And how long were you employed as a salesman by the P. Sherer Company?

A. I cannot tell you exactly; it has been a matter now of nine years ago; it was only for a few months.

Q. 6. And after that?

A. I was with the Eisner & Mendelson Company.

770 Q. 7. Did you go directly from the P. Sherer Company to the Eisner & Mendelson Company?

A. Yes, sir.

Q. 8. When did you enter the employ of the Eisner & Mendelson Company, if you can recollect?

A. Towards the very end of 1889 or the beginning of 1890; I can't say exactly, but it was somewhere around in the—possibly the last month in 1889.

Q. 9. While you were with the P. Sherer Company, did you sell them any Hunyadi waters, and if so, what?

A. Yes, sir; I sold for them Hunyadi Janos, Hunyadi Arpad, and a general line of mineral waters.

Q. 10. Did you sell for them the Hunyadi Bela water?

A. Yes, I sold the Hunyadi Bela water; that slipped my memory.

Q. 11. Then as I understand you, while you were in the employ of the P. Sherer Company, you sold the three Hunyadi waters, Janos, Arpad and Bela, is that correct?

A. Yes, sir; that is correct.

Q. 12. Where did you sell these waters?

A. I sold them for the P. Sherer Company in New York city and surroundings, what we call now the Greater New York.

Q. 13. And in selling these waters for the P. Sherer Company, did you visit the drug and grocery trade in New York city and vicinity to sell such waters?

A. Yes, sir.

Q. 14. And you sold them freely to the drug and grocery trade throughout the city and in the vicinity of New York, did you not?

A. Yes, sir.

Q. 15. While you were with the P. Sherer Company?

A. Yes, sir.

Q. 16. You say that after being a salesman for a few months with the P. Sherer Company, you entered the employ as a salesman of the Eisner & Mendelson Company, and you continued as such salesman until the present time?

A. Yes, with a couple of interruptions which had no interest in this business.

Q. 17. Were they short interruptions?

771 A. Yes, sir; going South to my home, or something in that style.

Q. 18. Otherwise you were continuously engaged from about the

year 1890, up to the present time as a salesman for the Eisner & Mendelson Company?

A. Yes, sir.

Q. 19. And as such salesman, did you travel selling their goods?

A. I have travelled and have sold all the large grocers, wholesale, and retail drug-houses east of Chicago of any consequence since that time. Well, I was with them for the first year and I did not travel very much, but since then I have sold about all the large trade there is east of Chicago—all the various mineral waters that we deal in, and the Hunyadi waters.

Q. 20. How many stores, grocers and druggists, in the aggregate have you visited during the last eight years in the course of your employment as *as* salesman for the Eisner & Mendelson Company?

A. That is a very hard question to answer; I should say I have sold, well, I would put the estimate low at thirty thousand, including all the wholesale and retail grocery and drug stores in all the country that I have been over.

Q. 21. While you were in the employ of the Eisner & Mendelson Company, you have stated that you have sold Hunyadi waters to this trade. What Hunyadi waters did you sell?

A. I have sold them Arpad, Matyas, Janos, Bela, Lazzlo—that is about all.

Q. 22. Have you known of any others in the trade?

A. Oh, yes, I have seen them, but they did not interest me to any extent.

Q. 23. What were those others that you have seen during the last eight years?

A. Well, I have seen Hunyadi Lajos, and I have seen a few bottles of something called Hunyadi Aesculap; that is about all the Hunyadis I can recall.

Q. 24. Have you seen the Hunyadi Vilmos?

A. Yes, I saw some of them going around.

772 Q. 25. Have you seen Hunyadi Lajos?

A. Yes, sir; I have seen some of them.

Q. 26. How were these different mineral waters sold by you to the trade?

A. By demand of what a customer wanted. I was out selling a general line of mineral waters and a customer told me what he wanted, and he got it; if we did not have it, why naturally, the customer did not get it.

Q. 27. How were these various Hunyadis distinguished?

A. Well, if a man wants a case of Hunyadi Janos, he would ask for a case of Hunyadi Janos, or if he wanted a case of Hunyadi Arpad, he would ask for a case of Hunyadi Arpad, or if he wanted a case of Hunyadi Matyas he would ask for a case of that; they are all advertised in such a way. You take the Hunyadi Matyas and the Hunyadi Arpad to my own recollection with Sherer, it was advertised to the physicians and to the public, in the medical journals, the medical associations, and I even helped to do it when I was there.

(By Mr. KNAUTH:)

Q. 28. You mean Hunyadi Matyas?

A. I said Arpad, sir. I said when I was with Sherer he ha Arpad. Sherer had no Matyas. I will come to Matyas in minute.

Q. 29. Suppose the trade asked you for a Hunyadi water?

A. I would ask him what he wants.

Q. 30. And according to his designation of Hunyadi Matya Hunyadi Arpad, Hunyadi Laszlo, you would give him those wate would you?

A. We carried those waters, yes, sir, if we had bought any carried it in stock, I would.

Q. 31. What would you do if you did not have it in stock?

A. Very often a man would give me a mixed order for miner waters, and it was to our interest to get it.

Q. 32. As I understand you, if you did have it in stock, and h gave you an order for anything you did not have, you woul get it?

A. Yes.

Q. 33. If he gave you an order for Hunyadi Janos you would g it and fill the order?

A. Yes, sir.

773 Q. 34. Or you would get Hunyadi Matyas if he ordered i and fill the order?

A. Yes, sir.

Q. 35. And the same way with the other waters that you deal in?

A. Yes, sir; we dealt in a general line of mineral waters.

Q. 36. You have spoken especially about the advertisement the Arpad. After you went with the Eisner & Mendelson Com pany, do you know whether they advertised the Hunyadi Matya water and if so, in what way, to your personal knowledge?

Objected to as incompetent.

A. Hunyadi Matyas has been advertised in the medical journal— what I have seen myself I allude to; I have myself been to med ical associations with our various lines of goods, Hoff's malt ex tract, Carlsbad Sprudel salts and Hunyadi, and myself given them to physicians and explained them to them as near as I could. I all our circular letters that we send out in relation to all of ou goods, we have always put a little slip in which no doubt you know in all the letters. We have made window displays with the drug gists for a good many years, to get the pulic to know what it is, an we have employed salesmen, and our men who called on phys cians; of which we had quite a few in the last few years, I hav been connected with the concern, and have always mentioned it i connection with our Hoff's malt extract and Sprudel salts.

Q. 37. And by Hunyadi waters you mean the Hunyadi Arpad the Hunyadi Laszlo, the Hunyadi Matyas and Hunyadi Bela, tha the Eisner & Mendelson Company dealt in; am I correct?

A. Yes, sir; you are correct.

Q. 38. How did you advertise the Hunyadi Matyas especially to the trade you have spoken of which you sold to?

A. Well, I would go into a drug store and show the man the Hunyadi Matyas. We had advertising—and would print slips for him to give to his customers in any quantity that he wished
774 with his name on the back, and he would distribute them, or we would distribute them—he could use his own choice about that; but my usual position was such that I had to see that they got all distributed in the immediate neighborhood of the person who dealt in the goods.

Cross-examination by Mr. KNAUTH:

X Q. 39. What was your salary when you entered the employ of the Eisner & Mendelson Company at the end of the year 1889?

A. I don't remember; that is a good many years back.

X Q. 40. What is your salary now?

A. My salary today is forty dollars a week.

X Q. 41. How long has it been $40 a week?

A. Since the 1st of January.

X Q. 42. Of this year?

A. Yes, sir.

X Q. 43. What was it previous to that time?

A. $30 a week.

X Q. 44. How long was it $30 a week?

A. I think the year before that; we usually got a raise about every year; sometimes it did not come.

X Q. 45. What was your salary in 1890?

A. Oh, that is too far back; I cannot remember that without reference.

X Q. 46. You don't know anything about it?

A. Well, I could not say exactly what my salary was in the year 1890; I didn't know you would want that question. If you would like to know it I could look it up.

X Q. 47. I want your recollection so far as you can give it; what was it in 1892?

A. I suppose I was drawing something like $15 or $18 a week, if you want me to recollect.

X Q. 48. Do you recollect what salary you drew as a salesman for the P. Scherer Company?

A. I know I drew a very small salary—I went there and I was comparatively a young boy. As you see I am not now very old. My salary then, I suppose, was about $12 or $14 a week—something on that style; they were not paying very big salaries, sir.

775 X Q. 49. Sherer was not a man of large means, was he?

A. You are asking me something I could not answer. You asked me in 1892 when I was in his employ, and I knew nothing about his finances.

X Q. 50. What else besides the Hunyadi Matyas water did you sell for the Eisner & Mendelson Company since 1890?

A. I have sold their general line of mineral waters.

X Q. 51. What were their general line of mineral waters?

A. Well, I would have to furnish you with a price-list; we have a great many of them.

X Q. 52. How many are there, about?

A. I cannot answer; if anybody don't know what they want in the general mineral-water line they send to Eisner & Mendelson and they generally get it.

X Q. 53. You cannot tell?

A. Everything of the mineral-water nature; if a person don't know where to get, they go to Eisner & Mendelson Company.

X Q. 54. Are there several hundred of them?

A. I would not say how many, because I have been asked for so many mineral waters, some which we have, and some which we haven't, in the number of years that I have been in the mineral-water business, going around every day, sometimes they ask for waters that I have never heard of at all.

X Q. 55. I don't mean what you have got orders for, but what you sold for the Eisner & Mendelson Company in the line of mineral waters?

A. The Eisner & Mendelson Company handle everything in the line of mineral waters.

X Q. 56. Then they had a very large number of mineral waters?

A. Yes, sir; they were general mineral-water dealers.

X Q. 57. And you sold all those different kinds of mineral waters for them as you happened to have them?

A. Yes, sir.

X Q. 58. Did you sell anything else besides mineral waters for them?

A. Yes, sir; Hoff's malt.

X Q. 59. Malt extract?

A. Yes, sir; Johann Hoff's malt extract.

776 X Q. 60. Is that also a large line of their business?

A. Yes, sir, that is quite an extensive business.

X Q. 61. What else did you sell for them?

A. Carlsbad Sprudel salts.

X Q. 62. That is also an article much sold?

A. Yes, sir, that is in good demand.

X Q. 63. What else did you sell for them?

A. Whatever they had to sell.

X Q. 64. What else was it?

A. Why, nothing in particular, except Johann Hoff's malt extract, and Carlsbad Sprudel salts and mineral waters; that is their line of business.

X Q. 65. Now, what do you remember about the Hunyadi Aesculap water which you have mentioned?

A. I remember nothing about it.

X Q. 66. Nothing at all?

A. Nothing more than I have seen it the same as you or any other man has.

X Q. 67. You don't remember, then, that Sherer had this water

with the red and white label marked "Aesculap" and not Hunyadi Aesculap?

A. I don't remember; I know nothing about that water when Mr. Sherer had it.

X Q. 68. Did you ever sell any Royal Hungarian bitter water for the Eisner & Mendelson Company?

A. No, sir.

X Q. 69. Never?

A. Never.

X Q. 70. Did you see it in their store or business?

A. No, sir.

X Q. 71. Never saw it?

A. No, sir; I wouldn't know a bottle of Royal Hungarian water.

X Q. 72. Have you ever seen the Royal Hungarian bitter water with the white and red label as it appears on the Exhibit Complainant's Exhibit Royal Hungarian Bitter Water Label?

A. Not to my knowledge have I ever seen that water.

X Q. 73. And yet you say that you entered the employ of the Eisner & Mendelson Company in the latter part of the year 1889?

A. Yes, sir.

X Q. 74. You did not see it then in their business?

A. All the Hunyadi water that I have ever sold, none ever bore that label.

777 X Q. 75. None that bore any white and red label?

A. Well, you are taking me back to 1889, and I am not certain—on the spur of the moment—and that is something I can't answer; to my knowledge I never have.

X Q. 76. What were you doing in the business of Eisner & Mendelson Company towards the end of 1889, when you entered their employ?

A. Selling goods.

X Q. 77. You were already employed as a salesman by them at that time?

A. As a salesman at the end of 1889?

X Q. 78. Yes.

A. I was selling Hunyadi water for the Eisner & Mendelson Company at the end of 1889 and beginning of 1890; I can't remember the exact date.

X Q. 79. Do you remember the month when you entered their employ in 1889?

A. I do not.

X Q. 80. Did you ever tell the trade that the Hunyadi Matyas water was the original Hunyadi water?

A. I did not.

X Q. 81. You never made any such assertion to the trade?

A. I did not.

X Q. 82. You are sure of it?

A. I am sure of it.

X Q. 83. Did you refer the trade to the testimonials contained in the Eisner & Mendelson Company's advertisements relating to the Hunyadi Matyas water?

A. The trade never asked about that, sir; all they wanted was the water there was a demand for; as long as they did not ask it, I had no business to refer to them.

X Q. 84. And you mean in 1889?

A. I didn't say in 1889—well, at the end of 1889, but at that time if you remember, we had the Arpad water, if my recollection serves me right, or 1890—I don't say which—I cannot name the dates now to perfection; at that time you spoke—you spoke of Hunyadi Matyas now—if my memory serves me right, I have only my memory to go by—we were selling a great deal more Arpad than we were Matyas.

X Q. 85. I am now speaking of the Hunyadi Matyas
778 water in the year 1889, when you entered the employ of the Eisner & Mendelson Company; did you at that time refer the trade to testimonials concerning that water?

A. My business never came in contact with testimonials; my business was the selling of goods, and no trade asked for testimonials.

X Q. 86. Do you mean to say that there was at that time a demand already for Hunyadi Matyas water?

A. Yes, sir; for—in what year are you alluding?

X Q. 87. In 1889?

A. In 1889, there was a demand for Hunyadi Matyas water; yes, sir.

X Q. 88. And you sold it in order to satisfy that demand, is that what you mean?

A. I mean to say that I sold the people whatever they wanted at that time.

X Q. 89. Well, I am meaning now especially the Hunyadi Matyas water; did you sell it to meet that demand?

A. Yes; when there was a demand for it.

X Q. 90. Well, there was a demand for it, you said?

A. In 1889?

X Q. 91. Yes?

A. At the end of 1889 and 1890, I asked you that—I cannot name the exact date now in speaking of it. I would rather have you quiz me on 1890, because my mind is not clear as to the date. That is a matter of eight years ago.

X Q. 92. You mean to say then, that in 1890, there was a demand for Hunyadi Matyas water, and you sold that water in order to satisfy that demand?

A. I do.

X Q. 93. Then you did not do anything in order to introduce that water and make a demand for it?

A. Why, certainly. I am a salesman for the concern, and my interest is to make a demand for anything I sell, as I go along, by advertising.

X Q. 94. How did you make that demand?

A. By giving the customers pamphlets for their trade with their names on the back.

X Q. 95. What pamphlets did you give to them with reference to the Hunyadi Matyas water?

A. Oh, various kinds, in the last few years.

779 X Q. 96. No; I am speaking of 1890, now?

A. You are taking me back too far.

X Q. 97. No; I am only taking you as far back as I want you. I am taking you back to the year 1890 now, and I ask you what pamphlets you distributed in that year relating to the Hunyadi Matyas water?

A. To the best of my recollection it was a small miniature label that was given to the trade to distribute to their customers, or we would distribute them to their customers. You ask now for the year 1890; that is my best recollection.

X Q. 98. You mean a small red and blue label showing the medallion of the king in the center?

A. I mean it was a miniature label of the Hunyadi Matyas, or a miniature label of the Hunyadi Arpad—exactly what I said.

X Q. 99. Both waters you introduced in this manner by distributing these labels?

A. They both had miniature labels; yes, sir; but there was other ways of introducing them besides.

X Q. 100. What other ways?

A. Through medical associations.

X Q. 101. What did you tell the medical associations about them?

A. I gave them a bottle of the Hunyadi water.

X Q. 102. What Hunyadi water?

A. Whatever we had at the time and were selling.

X Q. 103. In introducing the Hunyadi Matyas water, did you not tell the trade or the people with whom you came in contact what this water was—what its character was, and its advantages over other waters?

A. No, sir; the trade never asked me; the trade only satisfied their demand.

X Q. 104. But how could the trade know what the water was without being told?

A. The demand tells them.

X Q. 105. You mean that a demand arises before a water is advertised?

A. The water was advertised before I advertised it, I should judge;
I couldn't say that positively; I don't know what a concern
780 does before I go with them; that is something I am not in a position to answer.

X Q. 106. You did not know about the advertising previous to that?

A. I knew nothing about what happened prior to the time I went with the concern.

X Q. 107. Did you sell it largely during 1890?

A. I cannot answer that; that is too far back.

Redirect examination by Mr. COE:

R. D. Q. 108. When you speak of seeing the medical associations with reference to the Hunyadi Matyas, did you mean to confine your answer to the years 1889 and 1890, or subsequent years?

A. I mean to confine my answer to the years I have been in the employ of the concern.

R. D. Q. 109. Then you are not sure whether you saw the medical associations as early as 1889 or *or* 1890 or not?

A. No, sir; I am not sure; it is too far back; I cannot answer that question.

R. D. Q. 110. During the last eight years, have you ever made an exhibit of the Hunyadi Matyas water or the other waters you were dealing in to medical associations in connection with the Johann Hoff's malt extract?

A. Yes, sir.

R. D. Q. 111. What kind of an exhibit did you make of the Hunyadi Matyas water to such medical associations?

A. Well, I would have a space in a building where all the exhibitors would make their exhibits, and the doctors would assemble there all day long, and we would have our man in charge, and the men who were employed to speak to the physicians—we would have our malt extract and Carlsbad salts, and Hunyadi Matyas right on that stand, and the circulars connected with it or whatever was there in connection with it, and we would sample the physicians, and they would then go to the next stand and get something there.

Mr. COE: Counsel for defendants offers in evidence a certified copy of the summons, affidavit, complaint, answer and con-
781 sent and order of discontinuance and injunction order in the suit of The Apollinaris Company *vs.* Fr. Jac. Andres, brought in the New York supreme court, New York county, on or about the 10th or 11th day of February, 1887, and the same is marked "Defendant's Exhibit Hunyadi Matyas 1888 Suit."

Mr. KNAUTH: Objected to as immaterial and irrelevant.

Mr. COE: Counsel for defendants offers also in evidence a certified copy of the notice to vacate the injunction order dated the 11th day of February, 1887, and the affidavits filed in support of said motion, and the order vacating the said injunction in the suit of Apollinaris Company, Limited, *vs.* Joseph Ungar, brought in the supreme court of New York county, New York, on or about the 11th day of February, 1887, and the same is marked "Defendant's Exhibit Apollinaris Ungar 1888 Papers."

Mr. KNAUTH: Objected to as immaterial and irrelevant.

HENRY J. HANSON, sworn and examined for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. Please state your name, age, residence and occupation.

A. Henry J. Hanson; I reside in New York city; thirty years old; occupation, managing clerk in a law office.

Q. 2. Have you had any experience in obtaining papers from the clerk's office of the supreme court of the city of New York and the modes of procedure there?

A. I have, for the last fifteen years.

Q. 3. Did you at my request obtain the certified copies that I have offered in evidence marked "Defendant's Exhibit Hun-
782 yadi Matyas 1888 Suit," in the suit of Apollinaris Company, Limited, *vs.* Fr. Jac. Andres?

A. Yes, sir.

Q. 4. Did you also at my request obtain a certified copy of the various papers which have been marked "Defendant's Exhibit Apollinaris Company, Limited, *vs.* Ungar, 1888 Papers"?

A. Yes, sir.

Q. 5. Did you make search in the county clerk's office for the summons and complaint, answer, injunction order and affidavit on which such injunction order was founded in said suit?

A. Yes, sir.

Q. 6. Were you able to obtain such certified copies of the summons and complaint, answer, injunction order and affidavits on which such an injunction order was founded?

A. No, sir; I could not find them.

Q. 7. Did you make a thorough search?

A. Yes, sir.

Q. 8. Did you make the usual requisitions?

A. Yes, sir.

Q. 9. How many times did you go over to the clerk's office to search?

A. About seven times, and I could not find them; I searched for them under pleadings as well as orders. The papers should have been filed under the date of February 11th, 1887, the time recited in the order vacating the injunction, but they were not found there, and they should. If they could not be found there they should have been found under the date of the 9th day of July, 1887, that is the date of the order vacating the injunction which would probably be the judgment-roll in the matter, and they were not there, nor they were not found under any of those dates under the head of pleadings.

Cross-examination by Mr. KNAUTH:

X Q. 10. Did you make any search for the affidavits on behalf of the defendant in the suit of the Apollinaris Company, Limited, against Fred. Jac. Andres upon which the motion was made
783 to vacate the injunction in that case?

A. That was made by consent; I believe there was no notice of motion in that case.

X Q. 11. You mean there was no notice of motion on file?

A. In the Andres case?

X Q. 12. Yes.

A. No.

X Q. 13. Did you make a search for all of the papers which were on file in that case?

A. In the Andres case, all the papers are evidently together, the briefs and everything else, and I had a copy of the summons, complaint, the affidavits, and the injunction—the temporary injunction—also a copy of the consent and order of discontinuance in this case of Andres.

X Q. 14. Did you find any opposing affidavits in that case on behalf of the defendant Andres?

A. I was not requested to look for any such thing, and I don't think they were on file.

X Q. 15. You didn't look for them?

A. Not for those, no, in that case, because the consent of discontinuance was there. There was no affidavits in opposition, you know.

X Q. 16. Did you see any such papers on file?

A. I cannot recollect at present; I know there was briefs opposing and for; I did not notice any affidavits.

Mr. COE: Counsel for the defendants gives notice to counsel for the complainant on the record to produce two certain letters written by the Apollinaris Company, Limited, to Andreas Saxlehner, dated respectively the 24th of January, 1888, and the 26th of June, 1888, copies of which letters are set forth in the affidavit of Julius Charles Prince, dated May 19, 1897, and filed on the part of the defendant on the motion for preliminary injunction in the suit of Emelie Saxlehner against Henry G. Graef and Franz Draz in the circuit court of the United States, southern district of New York, said letters also being the same that are referred to, and a similar
784 statement or demand made with regard to the same on October 5, 1897, on the cross-examination of Kalman Saxlehner, taken on that day, he testifying as a witness on the part of the complainant in the present suit at that time; and defendants' counsel gives notice to complainant's counsel that unless said original letters are produced, that secondary evidence will be introduced of their contents.

Mr. KNAUTH: Complainant's counsel replies that he has never seen the letters called for, that they are not in his possession, and that he knows nothing of the existence of any such alleged letters.

Adjourned to Monday, March 14, 1898, at 2 p. m.

SAXLEHNER
v.
EISNER.

NEW YORK, *March* 14, 1898.

Met pursuant to adjournment.
Present: Counsel as before.

ISIDOR HALDENSTEIN, sworn and examined as a witness for defendants, testifies as follows:

Direct examination by Mr. COE:

Q. 1. State your name, age, residence and occupation.
A. Isidor Haldenstein; of lawful age; I reside at 206 West 132d street, in the city of New York. I am manager of the mineral-water business of the United Agency Company, selling agents of the Apollinaris Company, Limited, of London.
Q. 2. When did you become connected with the mineral-water business?
A. 1880.
Q. 3. How?
A. By going into the employ of Frederick De Bary & Company of this city, who were then agents of the Apollinaris Company, Limited.
Q. 4. For what waters were De Bary & Company the
785 agents for the Apollinaris Company, Limited, at that time?
A. Apollinaris Hunyadi Janos and Friederichschall.
Q. 5. How long did you continue in the employ of De Bary & Company?
A. Until January, 1889.
Q. 6. Why did you leave their employ?
A. The agency of the Apollinaris Company was transferred to Charles Graef & Company.
Q. 7. When the agency was so transferred you went with the transfer of the agency?
A. I went to Charles Graef & Company, yes.
Q. 8. And Charles Graef & Company were agents, as you say, for the Apollinaris Company, Limited?
A. Yes.
Q. 9. How long had they continued as such agents for the Appollinaris Company, Limited?
A. Until September 1, 1897.
Q. 10. Are you still in the employ of Charles Graef & Company?
A. No; I am in the employ of the United Agency Company.
Q. 11. Is such company the agents for the Apollinaris Company, Limited?
A. Yes.
Q. 12. While you were in the employ of Frederick De Bary & Company, from 1880 to 1889, did you handle and sell Hunyadi Janos water?
A. Yes.

Q. 13. As both being in the employ of Frederick De Bary & Company and as the representative of the Apollinaris Company, Limited?

A. As the employee of Frederick De Bary & Company.

Q. 14. Did Frederick De Bary & Company during the time when you were in their employ, from 1880 to 1889, have the sole and exclusive sale of the Hunyadi Janos water in the United States?

A. Yes.

Q. 15. From the time when you left the employ of Frederick De Bary & Company and entered the employ of Charles Graef & Company, in 1889, to September, 1897, did not Graef & Company have the sole and exclusive right to sell as agents for the Apollinaris Company, Limited, the Hunyadi Janos water in the United States?

A. Yes, the same as Frederick De Bary & Company under their contract with the Apollinaris Company.

786 Q. 16. And in 1889, Charles Graef & Company succeeded to that contract, did they not?

A. Succeeded to that sole agency.

Q. 17. So, as I understand you, from 1880 to 1897 you had knowledge from your connection with the respective firms of Frederick de Bary & Company and Charles Graef & Company of the sale of Hunyadi Janos in the United States, did you not?

A. Yes, through that connection.

Q. 18. Since Graef & Company ceased to sell Hunyadi Janos water, which I understand was in September, 1896, or 1897, has such concern sold a water called the Apenta?

A. The agents of the Apollinaris Company have sold the Apenta water since March, 1896.

Q. 19. Has this present firm through you succeeded Graef & Company as agents for the sale of the Apenta?

A. Yes.

Q. 20. Did not Emilie Saxlehner commence suit against Harry C. Graef and Franz Draz, composing the firm of Charles Graef & Company, in or about the spring of 1897?

A. Yes.

Q. 21. In the United States circuit court for the southern district of New York?

A. Yes.

Q. 22. And in such suit was not a motion brought on behalf of said complainant against said defendants for a preliminary injunction?

A. Yes.

Q. 23. Did you not make an affidavit in said suit dated on or about the 26th day of May, 1897?

Mr. KNAUTH: Objected to as irrelevant and immaterial.

A. Yes.

Q. 24. Said suit was brought substantially, was it not, to restrain the said defendants, Graef & Company, from the use of the words "U. J. Hunyadi," for the use of the Diamond brand of Apollinaris

label and for claimed imitation of the bottles and capsules in which such Apenta water was sold?

A. Substantially that, although I am not sure it was quite as broad as that.

787 Q. 25. But substantially such relief was asked for both in the suit and in the preliminary injunction, was it not?

A. Yes, the record shows just what was asked for.

Q. 26. I am of course asking you for your recollection on the subject; what was the disposition of such motion for preliminary injunction?

Mr. KNAUTH: Objected to as incompetent, irrelevant, and immaterial.

A. The motion was denied.

Q. 27. When you first entered the employ of Frederick de Bary & Company in or about the year 1880, as you say, they were selling Hunyadi Janos water, were they not, as agents for the Apollinaris Company, Limited?

A. Yes.

Q. 28. Look at the bottle now shown you with the label and capsules thereon and state whether or not, with the exception of the additional brand label on such main label, such red and blue label does not represent the label under which Frederick de Bary & Company, as agents for the Apollinaris Company, Limited, were selling the Hunyadi Janos water in 1880 when you entered their employ?

A. Yes.

Q. 29. And the bottles and capsules now shown you are similar to the bottles and capsules of Hunyadi Janos water which were so sold by Frederick de Bary & Company in 1880, when you entered their employ?

A. About the same.

Q. 30. And from 1880 to 1889, Frederick de Bary & Company continued to sell, as agents for the Apollinaris Company, Limited, Hunyadi Janos water in and under similar labels, bottles and capsules, did they not?

A. About the same.

Q. 30*a*. From 1889, when you entered the employ of Charles Graef & Company until the time you left their employ, they sold Hunyadi Janos water as agents for the Apollinaris Company in and under similar labels, bottles and capsules, did they not?

788 A. They did up to the time that they discontinued selling Hunyadi Janos.

Counsel for defendants offers in evidence the bottle inquired about of the witness in the last three or four previous questions and the same is marked "Defendant's Exhibit Hunyadi Janos Bottle, March 14, 1898, J. A. S., ex'r."

Q. 31. How early do you recollect of any other Hunyadi coming into the market in the United States in competition with the Hunyadi Janos water?

A. 1886 or 1887.

Q. 32. What was that water?

A. Hunyadi Arpad.

Q. 33. At or about this time, or previous thereto, was there not Hunyadi Janos water imported under a red and white label?

A. A Hunyadi Janos was imported under that label before th date.

Q. 34. In the market with the Hunyadi Janos water under its r and blue label sold by Frederick de Bary & Company, as agents f the Apollinaris Company, Limited?

A. Yes, of course.

Q. 35. Look at the label now shown you marked "Hunyadi Jan European label," and state whether or not this is the red and wh label referred to in the last previous answers?

A. I believe so.

Q. 36. Was not this Hunyadi Janos water you have spoken sold under this red and white label, imported and sold by P. Scher while you were in the employ of De Bary & Company?

A. I believe so.

Q. 37. Can you recollect whether or not such a red and wh Hunyadi Janos water, was not sold in the market previous to t Hunyadi Arpad water?

A. I am not sure as to dates; I believe it was.

Q. 38. Did not the Apollinaris Company, Limited, take legal p ceedings against Scherer, to endeavor to stop the sale of this Hu yadi Janos water under its red and white label?

Mr. KNAUTH: Objected to as incompetent.

789 A. Yes.

Q. 39. Did not such proceedings eventually terminate favor of Scherer and against the Apollinaris Company, Limited?

Mr. KNAUTH: Same objection.

A. The record shows they did.

Q. 40. You have spoken about the Hunyadi Arpad water bei sold to your recollection in or about the years 1886 and 1887, wh you were in the employ of Frederick de Bary & Company. Lo at the exhibit now shown you and state whether or not it represe as to label, capsule and bottle, the labels, capsules and bottles, und which such Hunyadi Arpad was so sold in or about the time y speak of, 1886 and 1887?

A. Substantially.

Defendants' counsel states on the record that the bottle so sho to the witness is the bottle introduced in evidence by the defenda and marked "Defendant's Exhibit Hunyadi Arpad Bottle."

Q. 41. In or about, or soon after the time you have spoken when Hunyadi Arpad water was sold in the United States in 1 or 1887, was there not another Hunyadi also sold in the mar called the Hunyadi Matyas water?

A. There was after that.

Q. 42. And prior to the year 1888, was there not?

A. I don't recollect the exact year without reference to the record; it must have been about that time.

Q 43. Now, in or about the year 1887 or 1888, did not the Apollinaris Company, Limited, bring suit against one Andres, to restrain him from selling such Hunyadi Matyas water?

Mr. KNAUTH: Objected to as incompetent.

A. I believe there was such a suit.

Q. 44. Do you recollect whether a suit was first brought
790 against said Andres in the United States circuit court for the southern district of New York?

A. I believe there was.

Q. 45. And that such suit was afterwards withdrawn on the ground of want of jurisdiction, was it not?

A. I am not sure as to the ground. I believe it was withdrawn or transferred, I don't know just how to express it.

Q. 46. And thereafter a suit was brought in the supreme court for the county of New York by the Apollinaris Company, Limited, against said Andres and an injunction *pendente lite*, or pending suit obtained, was there not?

A. I think so.

Q. 47. And such injunction was retained for about a year and a half, was it not?

A. I have no recollection of the duration of the injunction.

Q. 48. Look at the papers now shown you which I inform you are the certified copy of the affidavits, complaint, answer, consent and order of discontinuance and injunction order, in the suit of the Apollinaris Company, Limited, against F. J. Andres, and state whether or not such suit is not the suit in the supreme court of the city of New York, which you have referred to?

Mr. KNAUTH: Objected to because the papers shown the witness are not complete or a complete copy of the record in such case.

A. I have no recollection of the date, but the title of the case on the papers shown me is the title of the action I referred to.

Q. 49. And you remember that such an action was brought in the supreme court of the city and county of New York, do you not?

A. Yes.

Q. 50. Do you remember in or about the year 1886, similar suit was brought by the Apollinaris Company, Limited, against Joseph Ungar as the agent of Ignatz Ungar & Son, to restrain him from selling Hunyadi Arpad water, in the United States circuit court for the southern district of New York?

A. A similar suit was brought against Ignatz Ungar.

791 Q. 51. And said similar suit was discontinued in the United States circuit court, was it not on the ground of want of jurisdiction, or withdrawn?

A. Such a suit was discontinued or withdrawn; I can't say accurately as to the ground.

Q. 52. At or about the time of the withdrawal of such suit, a suit

was brought against Ungar in the supreme court for the city a
county of New York, to prevent him from selling Hunyadi Ar
water, was there not?

A. I believe so, yes.

Q. 53. And in such Ungar Hunyadi Arpad suit in the supre
court an injunction pending suit was obtained, was there not?

A. I believe so.

Q. 54. Do you recollect that in such Ungar suit a motion
made to vacate the injunction?

A. I believe there was; the record must show.

Q. 55. Do you recollect how such motion terminated?

Mr. KNAUTH: Objected to as incompetent.

A. I think the injunction was vacated on some grounds.

Q. 56. Look at the papers now shown you which are a certi
copy of the notice of motion, order vacating injunction and affi
vits on the part of the defendant, and state whether or not they
not the notice of motion, and proceedings thereafter to which
have referred?

Mr. KNAUTH: Objected to as incompetent, irrelevant and im
terial.

A. The papers shown me give the title of the case against Un
that I have referred to. I couldn't say that these are just a cor
copy unless I read them all over to compare them.

Q. 57. They are certified by the court, so you can take that
granted?

A. I assume they are because they contain a certificate of
clerk of the court.

Q. 58. Do you recollect whether or not prior to the va
792 tion of the injunction in this Ungar suit, Andreas Saxleh
was notified by the Apollinaris Company, Limited, that s
motion was pending and asked to assist in opposing said motio
vacate?

A. I couldn't state of my own knowledge.

Q. 59. Have you been so informed?

Mr. KNAUTH: Objected to as incompetent.

A. I was so informed.

Q. 60. What were the sources of your information?

Mr. KNAUTH: Same objection.

A. The Apollinaris Company.

Q. 61. In what way?

Mr. KNAUTH: Same objection.

A. Letters of Frederick de Bary & Company.

Q. 62. Were you not also informed by the affidavit of Ju
Charles Prince, which was filed on the motion to oppose the
liminary injunction in the suit of Emilie Saxlehner against H
C. Graef and Franz Draz in the circuit court of the United S
for the southern district of New York?

Mr. KNAUTH: Same objection and further objected to because no evidence has been offered that said Prince was authorized either by Andreas Saxlehner or by the complainant Emilie Saxlehner, to make any statements on his or her behalf.

A. I think he made some statement to that effect in an affidavit, if I remember rightly.

Q. 63. Look at the certified copy of affidavit now shown you, which is printed and state whether or not that affidavit is not the affidavit of Julius Charles Prince, referred to, such affidavit being sworn to the 19th day of May, 1897?

Mr. KNAUTH: Same objection.

A. Yes.

793 Q. 64. You were familiar with this affidavit, were you not, at the time of such injunction proceedings?

Mr. KNAUTH: Same objections and the attention of the court is called to the persistent attempt of defendant's counsel to offer clearly incompetent evidence without proof of facts which he seeks to prove thereby.

A. Yes.

Q. 65. I refer you especially to two letters set forth in said affidavit of Julius Charles Prince from the Apollinaris Company, Limited, to Saxlehner, dated respectively the 24th of January, 1888, and the 26th of June, 1888, and ask you whether one source of your information as to Saxlehner being notified prior to the vacation of this 1888 Ungar injunction, was not contained in those letters?

Mr. KNAUTH: Same objections and complainant's counsel gives notice to defendant's counsel that at the hearing he will move to strike out all the questions and answers relating to this alleged correspondence with Andreas Saxlehner or the complainant.

A. Yes.

Q. 66. Are you acquainted with Julius Charles Prince?

A. Yes.

Q. 67. He is not in this country, is he, at present?

A. No.

Q. 68. He resides in London?

A. Yes.

Q. 69. And he resided at the time he made the affidavit in May, 1897, in London, did he not?

A. Yes.

Counsel for defendants offers in evidence a certified copy of the said affidavit of Julius Charles Prince, and states on the record that his only object in offering said affidavit is to introduce the copies of the letters therein referred to, dated respectively January 24, 1888, and June 26, 1888, sworn to by Prince, as copies of said

794 original letters, and which original letters defendant's counsel has asked on the record complainant's counsel to produce.

The paper referred to is marked "Defendant's Exhibit Prince Affidavit, March 14, 1898, J. A. S., ex'r."

Mr. KNAUTH: Complainant's counsel objects to the offer of the exhibit as immaterial and incompetent and gives notice that at the hearing he will move to strike out the same. In addition he states that no competent proof has been offered by defendants' counsel that these alleged copies of letters are true copies of the originals, nor any proof that the originals were sent or mailed to Andreas Saxlehner, and that in the absence of any proof of that kind the exhibit is wholly inadmissible and incompetent.

Q. 70. Was Mr. Prince in the United States in 1888 or 1889, if you recollect?

A. In December, 1888.

Q. 71. He at that time was and had been previously thereto the secretary of the Apollinaris Company, Limited?

A. He had previously been the secretary. I believe at that time he was one of the directors.

Q. 72. You have previously stated that in the injunction proceedings in the suit of Emilie Saxlehner against Harry C. Graef and Franz Draz, you made an affidavit dated the 26th day of May, 1897, on the part of the defendants therein?

A. Yes.

Q. 73. In such affidavit did you not refer to and set forth a translated extract from the letter dated the 1st day of July, 1889, of Andreas Saxlehner to the Apollinaris Company?

Mr. KNAUTH: Objected to as wholly incompetent and inadmissible.

A. Yes, on information and belief as stated therein.

Q. 74. Where did you obtain this translated extract which you have set forth in said affidavit?

Mr. KNAUTH: Same objections.

795 A. I originally learned of it from letters of the Apollinaris Company to Frederick de Bary & Company.

Q. 75. And the translated extract in said letter is a correct translation and a correct extract, is it not?

Mr. KNAUTH: Same objections and also as leading.

A. I received it as a translation.

Q. 76. You received it as a translation, and you set it forth in your affidavit, did you not?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 77. Said translation reads as follows, does it not:

"With reference to the efforts which Hunyadi Arpad is making these must be regarded as part of those endeavors which the competition here have been making for years past without having been able to injure the sale of my water (goods) to any considerable extent. That Hunyadi Arpad is sent to America has surely been

known to you for years, just as you must also have experienced for years that nevertheless the sale of my goods continues to increase.

"The increased sale of Hunyadi Arpad, on which you lay stress in your letter of 28th ult. is without special importance, as all the bitter-water brands of the continent have for many years past been making considerable exertions to get a footing without having hitherto succeeded in damaging the sale of my (Saxlehner's) goods."

Mr. KNAUTH: Same objections and complainant's counsel gives notice to defendants' counsel that at the hearing he will move to strike out the whole testimony relating to this alleged letter.

796 A. Yes.

Q. 78. And this translating is set forth in your affidavit sworn to by you May 26, 1897, is it not?

Mr. KNAUTH: Same objections and notice of motion.

A. Yes.

Q. 79. After the vacation of this Ungar injunction in the year 1888, the Hunyadi Arpad water commenced to be sold again in the United States, did it not?

A. Yes.

Q. 80. In and under the same labels, bottles and capsules as shown on Defendant's Exhibit Hunyadi Arpad Bottle?

A. Substantially.

Q. 81. Do you recollect who sold such Hunyadi Arpad water in the year 1888 after the vacation of this Ungar injunction?

A. I forget whether P. Scherer & Company continued after that date or not.

Q. 82. You don't recollect whether P. Scherer & Company — it in the year 1888?

A. I believe they did.

Q. 83. You are not positive about that, but you are sure that it was sold in that year after the vacation of the injunction?

A. Yes.

Q. 84. And it continued to be sold under the same label and in the same bottles and with the same capsules in the year 1889, did it not?

A. Substantially the same, yes.

Q. 85. And in the year 1890?

A. Yes.

Q. 86. And 1891?

A. Yes.

Q. 87. And 1892?

A. Yes.

Q. 88. And 1893?

A. Yes.

Q. 89. Do you recollect whether it was sold by Eisner & Mendelson in the years 1892 and 1893?

A. I think it was.

Q. 90. Do you recollect, after the discontinuance of the suit of the Apollinaris Company, Limited, against Andreas in 1888, that the

Hunyadi Matyas water commenced again to be sold in the United States?

A. It did.

797 Q. 91. In or about what year, if you recollect?

A. I should think about 1890.

Q. 92. Look at the bottle now shown you marked Complainant's Exhibit B and state whether or not, with the exception of the Seal Brand label thereon, the main label on such bottle, and capsules and the bottles themselves resemble and are similar to the Hunyadi Matyas labels, bottles and capsules in which the Hunyadi Matyas water was sold in or about the year 1890.

A. Substantially, yes.

Q. 93. And such sale of Hunyadi Matyas water under similar main labels in similar bottles and with similar capsules has continued down to the present time, has it not?

A. Yes.

Q. 94. Look at the advertisement now shown you in the Druggists' Circular and Chemical Gazette of March, 1889, marked Defendant's Exhibit Hunyadi Arpad Advertisement No. 2, and state whether you recognize such advertisement as being published at or about that time?

A. Yes.

Q. 95. To your best recollection, do you recollect seeing it at that time?

A. About that time, yes.

Q. 96. And it was known to the firm of Charles Graef & Company also at that time as being published?

A. I don't believe any one else in that firm bothered about it except myself.

Q. 97. You attended to that part of the business, didn't you, with reference to advertisements and so forth?

A. Yes.

Q. 98. Did you have charge of the insertion of advertisements of the Hunyadi Janos water at that time for the firm of Charles Graef & Co.?

A. Yes.

Q. 99. Look at the advertisements now shown you in the Medical Record of May 6, 1889, marked Defendant's Exhibit Apollinaris Hunyadi Advertisement, and state whether at the instance of the Apollinaris Company or Charles Graef & Company, their agents for the United States, you inserted at or about this time this and similar advertisements in the Medical Record?

798 Mr. KNAUTH: Objected to as incompetent, irrelevant and immaterial, no connection with the complainant having been shown.

A. Yes.

Q. 100. In this advertisement it is stated that, as numerous aperient waters are offered to the public under names of which the word Hunyadi forms part, they have now offered an additional label comprising their registered trade-mark of selection, which

consists of a red diamond. Will you please state what Hunyadi waters were in the market in the year 1889?

A. At that time or shortly after Hunyadi Arpad or Hunyadi Matyas and probably also Hunyadi Laszlo.

Q. 101. How about Hunyadi Bela?

A. It may have been at that time.

Q. 102. Did you insert in any other papers similar advertisements to this in or about the year 1889, at the instance of the Apollinaris Company or Charles Graef & Company, their agents in the United States?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 103. What papers, if you recollect?

Mr. KNAUTH: Same objections.

A. I couldn't tell from memory now; I believe other medical papers.

Q. 104. And trade papers?

A. And trade papers.

Q. 105. In newspapers?

Mr. KNAUTH: Same objections.

A. I believe so; I am not sure as to the date.

Q. 106. Look at the advertisement now shown you marked Defendant's Exhibit Apollinaris Hunyadi Medical Record Advertisement of April 8, 1893, and state whether, in or about the spring of 1893, this advertisement was inserted by Charles Graef & Company as agents for the Apollinaris Company, Limited, in said Medical Record?

Mr. KNAUTH: Same objections.

799 A. I believe it was about April, 1893.

Q. 107. Was the same or similar advertisement, at or about this time, in the spring of 1893, inserted in other medical journals and trade papers?

Mr. KNAUTH: Objected to as incompetent.

A. I believe so.

Q. 108. Was the said advertisement or a similar advertisement inserted at the instance of the Apollinaris Company by Charles Graef & Company as their agents, in daily papers in the spring of 1893?

Mr. KNAUTH: Same objection.

A. I am not sure of the date, but I believe it was.

Q. 109. Look at the advertisement now shown you marked "New York Herald Apollinaris 1893 Advertisement" and state whether or not the Apollinaris Company, Limited, or Charles Graef & Company as their agents inserted this and similar advertisements in the New York Herald in or about the spring of 1893?

A. I presume it was about that time. It seems to be an advertisement from the New York Herald, judging by the type.

Q. 110. Look at the postal cards now shown you, marked Defendant's Exhibit Apollinaris Hunyadi Postal Cards, Nos. 1 to 5, and state whether or not these and similar postal cards were sent out and mailed by Charles Graef & Company, as agents for the Apollinaris Company, Limited, in the spring of 1893?

Mr. KNAUTH: Same objection.

A. This postal card was so sent out.

Q. 111. To whom were such postal cards and others like them sent out in the spring of 1893 by said Charles Graef & Company, as agents for the Apollinaris Company, Limited?

Mr. KNAUTH: Same objection.

A. That postal card was sent out to physicians.

800 Q. 112. About how many were distributed in the spring of 1893?

Mr. KNAUTH: Same objection.

A. I don't really recollect.

Q. 113. Approximately.

Mr. KNAUTH: Same objection.

A. I couldn't say; I suppose a pretty good quantity.

Q. 114. A large quantity?

Mr. KNAUTH: Same objection.

A. I would be glad to tell you if I recollected. I don't recollect whether it was all the physicians in the United States or only physicians in large cities.

Q. 115. There were several thousand sent out, though; you are sure of that, are you not?

Mr. KNAUTH: Same objection.

A. Yes.

Q. 116. Have you sent out similar postal cards to those since the year 1893?

Mr. KNAUTH: Same objection.

A. There may have been a smaller quantity sent out and probably was, after the spring of 1893.

Q. 117. Did you also, in or about the spring of 1893 send out this notice marked "Defendant's Exhibit Apollinaris 1893 Trade Notice," and similar notices to the mineral-water trade in the United States?

Mr. KNAUTH: Same objection.

A. That particular notice was sent out to the trade, yes.

Q. 118. By Charles Graef & Company, as agents for the Apollinaris Company, Limited?

Mr. KNAUTH: Same objection.

A. Yes.

801 Q. 119. How many of such notices were sent out in the spring of 1893, if you recollect?

Mr. KNAUTH: Same objection.

A. There must have been as many as several hundred.

Q. 120. Did you send similar notices to the drug trade of the United States at or about that time?

Mr. KNAUTH: Same objection.

A. That is what I was referring to by "the trade."

Q. 121. Weren't they sent out in larger quantities to the trade in the year 1893 than several hundreds?

Mr. KNAUTH: Same objection.

A. They were sent out to the customers of Charles Graef & Company, and it is on that that I base my estimate of the quantity.

Q. 122. Was not the same or similar notices to this Defendant's Exhibit Apollinaris 1893 Trade Notice, inserted in the daily papers of New York city and other cities throughout the United States?

Mr. KNAUTH: Same objection, and also objected to as leading.

A. This notice was inserted in some newspapers of the larger cities.

Q. 123. Now, in the spring of 1893, when the notices to which your attention has been called and the postal cards were sent out, what Hunyadis were in the market at that time?

A. Hunyadi Janos, Hun-adi Arpad, Hunyadi Matyas, Hunyadi Bela, Hunyadi Lajos and Hunyadi Miklos; those, I believe, were the principal ones; I am not sure that there were any more just at that time.

Q. 124. Wasn't the Hunyadi Laszlo in the market and selling in the spring of 1893 when all those notices were sent out?

A. Yes.

802 Q. 125. Between the years 1888 and 1897, how many Hunyadis have you known as being sold in the United States?

A. About ten or eleven.

Q. 126. Will you please repeat them?

A. Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos, Hunyadi Alajos, Hunyadi Vilmos, Hunyadi Bela, Hunyadi Miklos, Hunyadi Joseph; that is about ten; some were in small quantities.

Q. 127. Look at the bottle now shown you, marked "Complainant's Exhibit Hunyadi Laszlo Bottle," and state whether or not the labels, bottles and capsules on said bottle resemble the labels, bottles and capsules in which the Hunyadi Laszlo was sold in the period you have mentioned between the years 1889 and 1897.

A. Substantially, yes.

Q. 128. Look at the label now shown you, marked "Defendant's Exhibit Hunyadi Bela Label," and state whether or not such label does not represent the label on the bottles of Hunyadi Bela water

which you say were sold in the period you have mentioned between 1889 and 1897.

A. I don't recollect the exact details, but substantially so, I believe.

Q. 129. And the bottles and capsules in which such Hunyadi Bela water was sold resemble the bottles and capsules in which Hunyadi Janos, Hunyadi Arpad and Hunyadi Matyas were sold, do they not, substantially?

A. Substantially, yes.

Q. 130. Look at the bottle now shown you, marked "Defendant's Exhibit Hunyadi Lajos Bottle," and state whether or not such bottle does not resemble as to labels and bottles the labels and bottles in which the Hunyadi Lajos water to which you have referred as being on sale between 1889 and 1897, was sold.

A. Substantially, yes.

Q. 131. Look at the bottle now shown you, marked "Defendant's Exhibit Hunyadi Vilmos Bottle," and state whether or not such bottle does not resemble, as to labels, bottles and capsules, the labels, bottles and capsules that the Hunyadi Vilmos was sold in during the period you have stated.

A. Yes, substantially.

803 Q. 132. Look at the bottle now shown you, marked "Defendant's Exhibit Alajos Bottle," and state whether or not such bottle does not resemble, as to labels, bottles and capsules, the labels, bottles and capsules in which Hunyadi Alajos was sold during the period you have mentioned.

A. Substantially, yes.

Q. 133. You have referred to a water called Hunyadi Miklos as being on sale between 1889 and 1897; do you recollect particularly about what year that was principally on sale?

A. I saw it in Chicago in 1893.

Q. 134. Was that sold under a red and blue label, if you recollect?

A. Yes.

Q. 135. And in similar bottles provided with similar capsules as shown on the Hunyadi Janos, Hunyadi Arpad and Hunyadi Matyas bottles?

A. Yes.

Q. 136. Do you know under what name the Hunyadi Miklos water is now sold?

A. I couldn't say from actual knowledge.

Q. 137. Isn't it now sold under the name of "Hungaria"?

A. I was told so.

Q. 138. And you have so stated in your affidavit on the injunction motion in the suit of Saxlehner against Graef, sworn to by you in May, 1897, have you not?

Mr. KNAUTH: Objected to as incompetent.

A. I think I did.

Q. 139. You have referred in your testimony to a Hunyadi water called Hunyadi Joseph. About what year was that sold in quantities, if you recollect?

A. Referring to my table, I see it was imported in 1891 and 1894.

Q. 140. As I understand you, then, your recollection is that it was sold principally between the years 1891 and 1894; am I correct?

A. Yes.

Q. 141. Do you know whether that water is now sold in the market under the name of Franz Joseph water?

A. It may be.

804 Q. 142. In this affidavit in the Saxlehner Apollinaris injunction motion sworn to by you the 26th of May, 1897, you have stated the number of bottles of Hunyadi Matyas, Hunyadi Arpad, Hunyadi Laszlo, &c., that were imported between the years 1886 and 1896; how did you arrive at the figures given in such table?

Mr. KNAUTH: Objected to as incompetent, leading and as misleading.

A. By reference to the Journal of Commerce and Bonfort's.

Q. 143. How came you to refer to these particular sources of information?

Mr. KNAUTH: Same objections.

A. The Journal of Commerce publishes manifests and Bonfort's publishes importations of mineral waters.

Q. 144. Do they obtain them from the records of the custom-house?

Mr. KNAUTH: Same objections.

A. I don't know just how they obtain them; I suppose so.

Q. 145. They are recognized authorities for this class of information, are they not?

Mr. KNAUTH: Same objections.

A. That was the best source we could find.

Q. 146. Then as I understand you, you carefully prepared the table which you gave in your affidavit from the best sources of information obtainable at the time; am I correct?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 147. In such table you give the importations of the Hunyadi Arpad water as being 201 cases in the year 1886; as 1,000 cases in the year 1888; as 7,649 cases in the year 1889; as 7,979 cases in the year 1890; as 3,752 cases in the year 1891; as 4,438 cases

805 in the year 1892; as 2,882 cases in the year 1893; that information was correct, was it not?

Mr. KNAUTH: Same objections.

A. To the best of my information.

Q. 148. And the information was attained, as you have stated, by

careful inquiry at these sources, Bonfort's and the Journal of Commerce, was it not?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 149. From similar sources of information you stated in said affidavit, dated May 26, 1897, that the importation of Hunyadi Corvin was 20 cases in 1890, isn't that so?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 150. From similar sources of information you stated the importation of Hunyadi Matyas to be in the year 1890, 2,590 cases; in the year 1891, 4,662 cases; in the year 1892, 4,531 cases; in the year 1893, 1,954 cases; in the year 1894, 6,210 cases; in the year 1895, 5,185 cases; and in the year 1896, from January 1st to April 30, 520 cases; is not that so?

Mr. KNAUTH: Same objections.

A. Yes, to the best of my knowledge.

Q. 151. In the same tabulated statement derived from the same sources, you stated in your said affidavit of May 26, 1897, that the importation of Hunyadi Laszlo in the year 1890 was 200 cases; in the year 1892, 397 cases; in the year 1893, 264 cases; in the year 1894, 963 cases; and in the year 1895, 268 cases; isn't that correct?

Mr. KNAUTH: Same objections.

A. To the best of my knowledge.

Q. 152. In the same affidavit of May 26, 1897, you stated
806 the importation of Hunyadi Bela, derived from the same sources of information was in the year 1897, 397 cases; in the year 1892, 268 cases; and in the year 1893, 284 cases; is that correct?

Mr. KNAUTH: Same objections.

A. Yes, to the best of my knowledge.

Q. 153. In the said affidavit of May 26, 1897, you stated from the same sources of information that the importation of Hunyadi Joseph in the year 1891 was 132 cases; and in the year 1894, 144 cases; wasn't this correct?

Mr. KNAUTH: Same objections.

A. Yes, to the best of my knowledge.

Q. 154. In the same affidavit of May 26, 1897, you stated from the same sources of information, that the importation of Hunyadi Lajos was in the year 1892, 667 cases; in the year 1893, 2,265 cases; in the year 1894, 2,772 cases; in the year 1895, 5,148 cases, and in the year 1896, 528 cases; wasn't this correct?

Mr. KNAUTH: Same objections.

A. Yes, sir; to the best of my knowledge.

Q. 155. In the same affidavit of May 26, 1897, and from the same sources of information, you stated that the importation of Hunyadi Miklos in the year 1895 was 132 cases; was not this correct?

Mr. KNAUTH: Same objections.

A. To the best of my knowledge.

Q. 156. In the same affidavit of May 26, 1897, and from the same sources of information, you stated that the importation of Hunyadi Vilmos in the year 1896 was 262 cases; was not this correct?

Mr. KNAUTH: Same objections.

A. To the best of my knowledge.

Q. 157. And the figures given represent cases each containing 50 bottles, do they not?

Mr. KNAUTH: Same objections.

807 A. Believed to contain that quantity, yes.

Q. 158. Are you able to state from your knowledge of the various Hunyadis in the market and your knowledge of the trade in selling them whether the various dealers, wholesale and retail of mineral waters throughout the United States, in their price-lists, set forth and advertised these various Hunyadi waters, or some of them?

Mr. KNAUTH: Objected to as incompetent and as strongly leading.

A. The various waters were so listed in the price-lists mentioned.

Q. 159. From or about the year 1888 or 1889, what have you and the mineral-water trade understood the word Hunyadi to mean as applied to mineral waters?

Mr. KNAUTH: Same objections.

A. From about that time or shortly after up to 1897, I believe it was understood by such parties to mean an aperient water coming from the neighborhood of Budapest.

Q. 160. How were these different waters distinguished by the dealers in selling them during this time from 1889 on?

Mr. KNAUTH: Same objections.

A. I believe by the full names.

Q. 161. And by the full names you mean the word Hunyadi with the suffix or second name Arpad, Matyas, Janos, Bela, etc., do you not?

Mr. KNAUTH: Same objections.

A. Yes.

Q. 162. Do you recollect seeing advertisements or mailing slips of the Hunyadi Matyas water like Hunyadi Matyas mailing slips Nos. 1, 2 and 3 in or about the year 1892?

A. I have seen that slip, but I am not sure as to the date.

808 Q. 163. Do you recollect whether or not it was at or near that time, in or about the year 1892?

A. It may have been.

Q. 164. How long have you known Mr. Moritz Eisner, if you recollect, of that Eisner & Mendelson Company?

A. About nine years.

Q. 165. Do you recollect calling at the office of the Eisner & Mendelson Company and seeing Mr. Moritz Eisner and having a conversation with him in or about the year 1892, with reference to such mailing slips?

Mr. KNAUTH: Objected to as immaterial and irrelevant.

A. I may have called at that time. I don't recollect any particular interview unless you refresh my memory.

Q. 166. I will refresh your memory by asking you whether you do not recollect in an interview with Mr. Eisner making the objection or protest to the further sending out of those slips by the Eisner & Mendelson Company on the ground that the analysis on the back of such slip was not fair to the Hunyadi Janos Company?

Mr. KNAUTH: Same objections.

A. I believe there was some talk about an analysis, but whether it was because it appeared on this slip or some other advertisement, I don't recollect.

Q. 167. What was that talk, if you recollect?

Mr. KNAUTH: Same objections.

A. As far as I recollect the statement was made by me that the Hunyadi Janos was stronger than the Hunyadi Matyas and upon that account the statement on the advertisement of the Eisner & Mendelson Company was incorrect.

Q. 168. What did Mr. Eisner say with reference to that, if you recollect?

Mr. KNAUTH: Same objections.

809 A. If I recollect rightly he said he would correct that statement.

Q. 169. By discontinuing the advertisement of the comparative analysis or by furnishing another analysis?

Mr. KNAUTH: Same objections.

A. I do not exactly recollect the order in which it was to be corrected. I recollect the mere fact that the correction was to be made.

Cross-examination by Mr. KNAUTH:

X Q. 170. I notice that on the bottle of Hunyadi Janos water as sold by the Apollinaris Company which was shown to you, there is an additional blue strip of paper pasted containing the words "Bottled in Hungary, Andreas Saxlehner, Budapest, proprietor of the spring;" do you remember when that additional strip was first on these bottles?

A. Some time after the passage of the tariff law in 1890.

X Q. 171. The McKinley bill?

A. I forget whether it was the McKinley bill or the Administration bill; the tariff some time after the fall of 1890.

X Q. 172. Was it in consequence of that law?

A. In consequence of that law, I believe.

X Q. 173. Is it your recollection that this strip was put on a short time after the law of 1890 went into effect?

A. It must have been.

X Q. 174. According to your recollection?

A. Yes.

X Q. 175. Previous to that time, as I understand it, the red and blue main label of Andreas Saxlehner was on the bottles, leaving a small space between the two ends of the label without any such additional strip pasted over that space?

A. The blue strip that you speak of was absent.

X Q. 176. Now do you recollect at what time this additional strip was first printed so as to be a part — the main blue and red
810 label and not separately pasted upon the bottle?

A. I really don't recollect the exact date.

X Q. 177. Will you now please look at Defendant's Exhibit Hunyadi Janos European Label, the red and white label of Saxlehner which was shown to you on your direct examination and especially at the words "Saxlehner's bitterquelle," which are printed in red type obliquely across the white wings of the label, and state whether at the time when you knew Saxlehner's water imported under this label in this country there was any other bitter water on the market here which had such red print obliquely across the wings of the label; just give us your recollection on the subject?

A. I don't recollect any other than the Hunyadi white or blue label.

X Q. 178. You mean the white and red or the red and blue?

A. The white and red or the blue and red, so far as I recollect.

X Q. 179. How long do you recollect having seen this red and white label of Andreas Saxlehner used upon this Hunyadi Janos water in this country?

A. I think I have seen some with that label perhaps as far back as 1880.

X Q. 180. When did you first become acquainted with the Hunyadi Janos water of Andreas Saxlehner?

A. To any great extent, 1880.

X Q. 181. That was at the time when you went into the employ of De Bary & Company?

A. Yes.

X Q. 182. From that time commences your more intimate acquaintance with the Hunyadi Janos water?

A. Yes.

X Q. 183. Were you practically in charge of the sale of the Hunyadi Janos water in the business of De Bary & Company until 1889 or thereabouts?

A. From December, 1883, to January, 1889.

X Q. 184. What were you doing in their business between 1880 and December, 1883?

A. I was familiar with the water business, but was not absolut
in charge.

811 X Q. 185. But you were also attending at that time to
sale of the Hunyadi Janos water?

A. Practically, yes.

X Q. 186. Were you acquainted with the manner in which t
Hunyadi Janos water was advertised by De Bary & Company or
the Apollinaris Company, Limited, in this country from 1880?

A. Yes.

X Q. 187. In what manner was it advertised?

A. In medical papers and newspapers.

X Q. 188. In trade papers?

A. In trade papers, yes.

X Q. 189. Was it advertised in daily newspapers?

A. In daily newspapers.

X Q. 190. In all the larger cities?

A. Yes.

X Q. 191. How much was it advertised?

A. I don't recollect the exact amount of money that was expend
it was referred to in Mr. Prince's affidavit.

X Q. 192. Can you tell us approximately what sum of mo
was spent to advertise Hunyadi Janos water in this country fr
about 1880, when you first became acquainted with the water he

A. I have forgotten. It was well advertised.

X Q. 193. It was very heavily advertised, was it not?

A. Yes.

X Q. 194. Was it also advertised in daily papers in other ci
than the city of New York?

A. Yes.

X Q. 195. In all the large cities?

A. Yes.

X Q. 196. All over the Union?

A. All over the United States.

X Q. 197. Did De Bary & Company send out any mailing ma
in the way of circulars or pamphlets or other advertisements throu
the mails for the Hunyadi Janos water?

A. Yes.

X Q. 198. Was that done to a large extent?

A. In the first few years that form of advertising was don
quite some extent.

X Q. 199. Mr. De Bary has given it as his opinion that u
about 1885 the Hunyadi Janos water was the bitter water wh
was most heavily advertised in the United States; does that acc
with your experience?

A. I think it was.

812 X Q. 200. Who spent the money for this advertising?

A. The Apollinaris Company.

X Q. 201. Under their contract with Saxlehner?

A. Yes.

X Q. 202. You knew of the existence of that contract, did
not?

A. I had heard there was a contract and I presumed there was.

X Q. 203. You have stated about the year 1885 or 1887 you first noticed the sale of water bearing the name Hunyadi Matyas, and other water bearing the name Hunyadi Arpad; did you, previous to that time, give any attention to bitter waters which were offered in the market in competition with your Hunyadi Janos water?

A. Not very much.

X Q. 204. How did it happen that in these years, 1886 or 1887, you took steps to obtain an injunction against these waters?

A. The Apollinaris Company directed their counsel here to take such steps.

X Q. 205. Did you, previous to that time, have any knowledge of the sale of these waters in the market here?

A. No.

X Q. 206. If Hunyadi Arpad water had been offered in this market to any great extent, would you not have noticed the offer and sale of such water previous to 1886?

A. I think I probably would.

X Q. 207. Do you remember how you happened to obtain the first knowledge of the sale of Hunyadi Matyas water by Andres here?

A. I don't recollect the circumstances.

X Q. 208. Do you recollect the circumstances which led to your first information concerning the sale of Hunyadi Arpad water here?

A. I probably saw it at Scherer's store which I frequented at that time. I may have noticed an importation announced in the Journal of Commerce or some other trade paper.

X Q. 209. When you first noticed this Hunyadi Arpad water, did you at once communicate to your superiors in the company to take steps as to enjoining them?

A. As soon as I learned of the importation, I, in behalf of
813 Frederick De Bary & Company, notified the Apollinaris Company of such importations.

X Q. 210. That was when or about when?

A. It must have been in 1886.

X Q. 211. You had no knowledge of the importation of Hunyadi Arpad water in 1884 or 1885?

A. No.

X Q. 212. You say you frequently passed Scherer's place or went to Scherer's place during the years 1884, 1885, and 1886?

A. Yes.

X Q. 213. Then I take it that if Scherer did import and sell any Hunyadi Arpad water previous to 1886 that must have been in small quantities so as to escape your attention?

A. I should think so.

X Q. 214. Did you know of the sale of any Rakozcy Gyorgy water in this market previous to 1866?

A. I don't know when it first came in.

X Q. 215. You have no recollection of it?

A. Not as to the exact date.

X Q. 216. Do you recollect whether it was previous to your first notice of the Hunyadi Arpad water, or was it later that you saw the Rakoczy Gyorgy?

A. I haven't any recollection that would enable me to answer whether it was before or after.

X Q. 217. Did I understand you right that you succeeded for a year or two, for about a year or a year and a half, in stopping the importation and sale of the Hunyadi Matyas water as imported by Andres, and the importation and sale of the Hunyadi Arpad water as imported by Ungar?

A. If I recollect rightly, it was stopped, but I don't know the exact period. These things have gone out of my memory.

X Q. 218. Do you know whether, after the year 1888, Andres continued to import any Hunyadi Matyas water?

A. I am inclined to think he stopped it. I am not sure whether he continued or not.

X Q. 219. Do you remember under what label Andres'
814 Hunyadi Matyas was imported into this country?

A. I think I could recognize it if it was shown.

X Q. 220. I show you now a red and white label and ask you to look at that and state whether you recognize it?

A. The label looks very familiar.

X Q. 221. Do you recollect whether that was Andres' label or not?

A. It may have been.

The label referred to is marked for identification, Complainant's Exhibit Andres' Label, March 14, 1898, J. A. S., ex'r.

X Q. 222. Did you, previous to the year 1886, see in the market any bottles of Hungarian bitter water offered or sold here which bore the name Hunyadi besides your Hunyadi Janos water?

A. None besides the Hunyadi Janos imported directly or indirectly that I can recollect.

X Q. 223. How was the Hunyadi Janos water up to that time bought and sold, under what name or names?

A. In this country, Hunyadi Janos.

X Q. 224. Was that the only name under which the public was in the habit of buying it?

A. Orders came in to Frederick De Bary & Company also for Hunyadi.

X Q. 225. When counsel for Andres and Ungar made motions to dissolve the injunctions against these persons were you in conversation or consultation with counsel acting for the Apollinaris Company in these suits?

A. Yes, sir.

X Q. 226. Was there not some defect in the Hungarian law relating to trade marks at that time discussed between counsel for the Apollinaris Company?

A. I didn't pay attention to the questions at law; I don't know just what was discussed about them; it was concerning questions of the trade here.

X Q. 227. Do you not remember that at that time the question was largely discussed between you and counsel for the Apollinaris Company as to whether Saxlehner found any protection
815 under the Hungarian laws against imitators of his name and labels in Hungary?

A. I don't recollect.

X Q. 228. Have you any recollection of the sale by the Eisner & Mendelson Company of a bitter water under a red and white label as the same appears on Complainant's Exhibit Royal Hungarian Bitter Water in the year 1889 and the commencement of 1890?

A. I recollect such a label as was shown me, but I don't recollect the exact dates.

X Q. 229. Do you recollect seeing any advertisement of the Eisner & Mendelson Company in the Druggists' Circular and Chemical Gazette displaying a red and white label similar to that on this bottle in March, 1890?

A. The label looks familiar. I don't recollect whether I saw the advertisement. That seems to be an advertisement of March, 1890, in the Druggists' Circular.

X Q. 230. Do you recollect the advertisement of June, 1890, in the same paper, which is pasted on the same sheet of pasteboard here before you showing a blue and brownish label?

A. I have seen an advertisement like that in the Druggists' Circular, I don't recollect the date, but it is evidently an advertisement in the Druggists' Circular of June, 1890.

The paper referred to is marked for identification Complainant's Exhibit Eisner's Change of Label, March 14, 1898, J. A. S., ex'r.

X Q. 231. Did you ever see that advertisement of the Eisner & Mendelson Company, as shown by Complainant's Exhibit Druggists' Circular Publication displaying "The original Hunyadi water" in prominent print?

A. I probably saw that advertisement; I believe I did.

X Q. 232. In a publication of 1893, the firm of Charles Graef & Company stated: "Paragraphs have recently appeared in some newspapers here stating that a New York firm of mineral-water dealers are the lessees in America of the Hunyadi water of
816 Budapest and respectively sole agents in the United States for the famous Hunyadi springs of Hungary. These statements are absolutely false, and the intention with which they are made is obvious." To what advertisements did your firm of Charles Graef & Company refer by this statement?

A. The advertisements of the Eisner & Mendelson Company, I believe.

X Q. 233. Did you see such advertisements as were described in this statement in the papers at that time?

A. Yes.

X Q. 234. You stated that you had known since 1889 and up to the year 1897 the following waters: Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos, Hun-

yadi Alajos, Hunyadi Vilmos, Hunyadi Bela, Hunyadi Miklos and Hunyadi Joseph. Did you mean to say that you knew all these waters during the whole period from 1889 up to 1897, or did you mean that within that period at different times you knew these waters?

A. Rather within that period.

X Q. 235. What do you know about the waters called Vilmos and Hunyadi Alajos?

A. They were imported to a moderate extent.

X Q. 236. Do you know where the springs are from which these two waters, Hunyadi Vilmos and Hunyadi Alajos, come?

A. No.

X Q. 237. Please look at the labels appearing on the bottles of these two waters and state whether the analysis of these two waters are not exactly the same.

A. The analysis on them are the same.

X Q. 238. Is not the picture appearing on the medallion in the central part of the label the same on both bottles?

A. Yes.

X Q. 239. Do you know whether that is the picture of the Hunyadi Alajos or the picture of the Hunyadi Vilmos?

A. I do not.

(Cross-examination closed.)

817 Redirect by Mr. COE:

R. D. Q. 240. Were you subpœnaed to testify in this case?

A. Yes.

R. D. Q. 241. At the time when these 1893 statements as to Hunyadi being a generic term and paragraphs appearing in the paper were inserted and advertised by Charles Graef & Company, were not the Eisner & Mendelson Company sellers of various Hunyadi waters?

A. Yes.

R. D. Q. 242. Were they not sellers of the Hunyadi Arpad, the Hunyadi Lazlo, the Hunyadi Matyas, and the Hunyadi Bela at that time in 1893?

A. I believe they were, yes.

R. D. Q. 243. And were not the Eisner & Mendelson Company, being agents of these various waters or sellers thereof, rivals and competitors with the Apollinaris Company as sellers of the Hunyadi Janos waters at that time?

A. The waters they sold were in competition with Hunyadi Janos.

(Signature waived.)

(Defendants rest.)

818 DEFENDANT'S EXHIBIT 1873 HUNGARIAN DECISION, ENGLISH TRANSLATION.

Translated from Hungarian.

Copy. Royal Hungarian ministry of agriculture, industry and commerce, No. 8317, Budapest, June 9, 1873. To the town council of the royal free metropolis Buda, at Buda. In returning the enclosures of the petition addressed to the minister of the interior, but by him transmitted to me for competent decision, with regard to the complaint between Andreas Saxlehner and Ignatius Markus touching the denomination of a bitter-water spring discovered by the latter with the name "Hunyady Matyas medicinal spring" I hereby inform the metropolitan council that I have to reverse that part of the council's decision No. 11948 of August 16th of last year which denies Ignatius Markus the permission to name the bitter-water spring discovered at 915, Kelenföld, "Hunyady Matyas" and sell its water under such denomination. Such decision had to be reversed because according to the VIII law of the year 1872 the regular notification of a trade cannot be made dependent on the use or the prohibition of the name or a trade-mark—even if this be a proper name—and further because the name "Hunyady Janos" used for many years by Andreas Saxlehner for the denomination of his own bitter-water and medicinal spring, and the name "Hunyady Matyas" intended to be used by Ignatius Markus cannot be considered as trade-marks, because the rule existing for the protection of trade-marks and samples, as mentioned in § 17 of the customs and commercial treaty embodied in the XVI law of the year 1867 is applicable to such trade-marks and samples only as have been secured by having been duly deposited and registered with the competent chamber of industry, which in the present case not only
819 does not appear to have been done—at least there is no mention hereof in the documents—but properly speaking it could not be done at all, since "Hunyady Janos" and "Hunyady Matyas" represent two quite clearly different names which may stand without any infringement to each other. From a sanitary point of view as the chemical certificate and the opinion of the chief physician testify to similar constituents in Ignatius Markus's bitter water as those contained in the other kelenfold bitter waters, it cannot have an effect different from that of Andreas Saxlehner's bitter water and thus the use of the former in illnesses where Saxlehner's is prescribed with good result, cannot have a harmful effect and *vice versa*. In the light of the foregoing the arguments adduced in motivation of the refusal had to be put aside as quite untenable suppositions and the permission is to be granted to Ignatius Markus to the title by him wished to be adopted, namely, "Hunyada Matyas medicinal spring" dismissing the unjustified protest raised thereto by Andreas Saxlehner, which is to be notified to the parties interested, returning to them at the same time their papers. Zichy M. P. Stamp one florin.) I hereby certify that the present copy is abso-

lutely identical with the original kept sub No. 2232/872 Buda archive at the archives of the metropolis, Budapest, 7th September, 1893. Louis Schmall, M. P. underkeeper of archives. (L. S.) Stamp 50 kr. No. 600/1897. I certify that this copy is exactly identical with the copy bearing a stamp for one florin, produced by the Budapest firm—Andreas Saxlehner. Given at Budapest, 12th March, 1897. Dr. Albert Edmund Hajôs, substitute of Mr. Albert Gaszner, royal notary public at Budapest, as per decree No. 246/1896 of the Budapest chamber of notaries public. (L. S.) Legalization 30 kr., stamp 50 kr., total 80 kr. No. 1675/pres. 1897. The signature and seal of Dr. Albert Edmund Hajôs as substitute of Albert Gaszner, Budapest notary public, is hereby legalized according to § 67 of the XXXV law of the year 1874. Budapest, 27th March, 1897.
820 Dr. Z. Francis Horvath, president. (L. S.) No. 19282/Min. of Just. 1897. The signature and official seal of the president of the Budapest royal tribunal is hereby legalized. Budapest, 30th March, 1897. From the royal Hungarian ministry of justice, Dr. Albert Alexy, ministerial councillor. (L. S.)

I, the undersigned, sworn interpreter, do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 27th April 1897.

[SEAL.] IVAN BOSANYI,
Sworn Interpreter.

DEFENDANT'S EXHIBIT MATTONI 1889 CONTRACT, ENGLISH TRANSLATION.

The following agreement has been entered on this day between Mr. Heinrich Mattoni, of Budapest, proprietor of the so-called Mattoni's bitter quellen, the management of which is at present in the hands of the firm of Mattoni & Wilie, and between the Eisner & Mendelson Co., a company duly incorporated in the State of Pennsylvania, United States of North America, residing in Philadelphia and in New York, represented by their authorized representative and attorney, Mr. Moritz Eisner of New York.

1. Mr. Heinrich Mattoni herewith grants to the Eisner & Mendelson Co. the sole agency for the United States and Canada for the sale of the Hungarian bitter waters owned by him for a term of twenty years, commencing from September 1st, 1889 (eighteen
821 hundred and eighty-nine), until the 31st day of August, 1909 (nineteen hundred and nine).

2. Mr. Heinrich Mattoni agrees not to sell or consign his Hungarian bitter waters during this time to any other concern in the United States of North America or in Canada, directly or indirectly, and to do all in his power to protect the Eisner & Mendelson Co. from opposition in the trade of bitter waters shipped by Mr. Heinrich Mattoni.

3. Mr. Heinrich Mattoni agrees to deliver the water free on board

the railroad in Budapest, packed in cases of 50 bottles, each bottle to contain ⅔ liter water and to be fully labeled, at the price of five gulden Austrian money, f. o. b., Budapest. Freight and duty are to be paid by the Eisner & Mendelson Co. Terms to be three (3) months from date of arrival in New York, or two per cent. (2%) cash discount against sight draft Vienna or Budapest upon arrival of goods in New York.

4. Mr. Heinrich Mattoni is not responsible and does not guarantee against breakage, shortage or any damage done to the water through freezing during the transportation.

5. Should the quantity of goods taken by the Eisner & Mendelson Co. during the fifth year of this contract, that means from the 1st day of September, 1893, till the 1st day of September, 1894, not to amount to two thousand cases, this contract is to be considered void. This quantity of two thousand (2,000) cases must, beginning from the 1st day of September, 1894, be taken every year during the entire duration of this contract. This quantity, however, must not be ordered at once, and not in lots of more than 400 cases at one time. It is especially agreed upon that any larger quantity as well, which the Eisner & Mendelson Co. might
822 order, is to be charged at the price given under number 3.

6. The Eisner & Mendelson Co. on the other hand agrees to take care of the interests of the firm of Heinrich Mattoni in every respect, and especially not to work for nor assist any other bitter-water spring from any other source, either intellectually or materially.

7. The Eisner & Mendelson Co. furnishes out of their capital and on their own account all expenses connected with the introduction of the bitter water, as advertising in daily papers as well as in medical papers, pamphlets, distribution of circulars, and Mr. Heinrich Mattoni in consideration of the exceedingly low price given in number 3 will not make any contributions or concessions of any kind whatever.

8. The Eisner & Mendelson Co. also undertakes to have their agents call on physicians throughout the United States and Canada during the duration of this contract in the interest of Mattoni's bitter springs, free of charge to Mr. Heinrich Mattoni, and to interest said physicians in them, and in general to try to get as large a consumption as possible.

9. After the expiration of the term of twenty years given as the duration of this contract, this contract will be in force under the same conditions for twenty more years to come, if the Eisner & Mendelson Co. has fulfilled all conditions given in this contract.

10. In case of dispute between the two parties of this contract the court of arbitration of the Budapest stock and bond exchange is to decide.

11. This contract is binding for both parties of this contract, and

also for the successors and administrators of both contracting
823 parties, unless Mr. Heinrich Mattoni has sold his property in Budapest before the 1st day of September, 1889.

Giesshuebel-Puchstein, July 30th, 1889 (eighteen hundred and eighty-nine).

(Signed) HEINRICH MATTONI.
(Signed) EISNER & MENDELSON CO.,
p. p. MORITZ EISNER.

(Signed) GUSTAVE KAHN, *As Witness.*
(Signed) CARL SCHMIDT, *As Witness.*

DEFENDANT'S EXHIBIT MATTONI HUNYADI MATYAS LEASE, ENGLISH TRANSLATION.

Lease

which has this day been irrevocably made between Mr. Heinrich Mattoni, the proprietor of the firm of Mattoni & Wille, and owner of the so-called "Mattoni's Ofener bitter-water springs," which springs are under the management of the said firm of Mattoni & Wille, in Budapest, party of the first part, as lessor, and the Eisner & Mendelson Co., a company duly incorporated under the laws of the State of Pennsylvania, United States of America, and located in Philadelphia and New York, party of the second part, as lessee.

First. Mr. Heinrich Mattoni leases and the Eisner & Mendelson Co. rents the Ofener bitter-water spring in Budapest, owned by Mr. Heinrich Mattoni, and bearing the legally authorized name of "Hunyadi Matyasquelle No. II," (Hunyadi Matyas spring number two), so that the Eisner & Mendelsohn Co. is entitled to have all the bitter water for their transatlantic use bottled from the said spring.

824 Second. The Eisner & Mendelson Co. hereby binds itself to have the filling of this water done solely through the firm of Mattoni & Wille, at Budapest.

a. The firm of Mattoni & Wille is to provide at their own expense everything necessary for the filling of the water, glass bottles, corks, caps, labels, straw cases, and to pay the wages, etc., and to pack the goods at their own expense in cases containing fifty ½-liter bottles ready for shipment, for which the Eisner & Mendelson Co. agrees to pay to Messrs. Mattoni & Wille, of Budapest, the amount specified in part IV of this agreement.

b. The lessor, Mr. Heinrich Mattoni, has absolutely no control as regards the adjustment of the bottles and the preparation and affixing of the labels; as regards the matters pertaining to the filling of the bottles therefore, the firm of Mattoni & Wille is absolutely under the direction of Eisner & Mendelson Co. who shall have unlimited authority in accordance with this contract of lease. As regards the trade-mark (label) under which the said bitter water is to be imported it shall be incumbent on the Eisner & Mendelson Co. alone, therefore, to care for the protection thereof and the right of

sale thereunder and to bear the expense thereof, and to answer morally and materially for every dispute with third persons as well as for all other damage arising from these exportations, that is, the Eisner & Mendelson Co., in New York, agrees to become responsible morally as well as materially for all litigation as regards third persons that may be eventually caused thereby.

Third. The Eisner & Mendelson Co., as lessee, agrees to pay a yearly rent of one thousand florin- Austrian currency, which is to be paid on the first day of March at the end of each year of the lease, into the hands of the lessor, Mr. Heinrich Mattoni, of Budapest.

825 Fourth. In reference to the expenses incurred by providing the material and the bottling of the goods and putting the same up ready for shipment, as per par. II–*a*, including cartage to railroad depot or pier in Budapest, the Eisner & Mendelson Co. agrees to refund the cost, and in addition thereto one and a half kreuzer Austrian currency per bottle for attending to same, in cash to Messrs. Mattoni & Wille, Budapest; these expenses are to be charged per case containing fifty ¾-liter bottles at present market prices and amount to four gulden and 75 kreuzer per case of fifty ¾ liter bottles; the Eisner & Mendelson Co. therefore agrees to pay for each case of fifty ¾-liter bottles put up for them the amount of four gulden and 75 kreuzer and the additional amount of one and a half kreuzer per bottle, that is 75 kreuzer per case, altogether five gulden and 50 kreuzer Austrian currency per case, to Messrs. Mattoni & Wille, Budapest, in cash money. Should the cost of material in the course of time be reduced or increased, then the amount to be paid for said cost shall be reduced or increased exactly in accordance with whatever change in price may take place.

Fifth. This lease is to be in force for five successive years from the first of March, 1890, until the twenty-eighth of February, 1895. The Eisner & Mendelson Co. is entitled to prolong this lease under the same terms for twenty more years from the first of March, 1895, on a notice referring thereto and forwarded by the Eisner & Mendelson Co. at the latest on January 1st, 1895, to Mr. Heinrich Mattoni or his legal successors, is sufficient to prolong this lease for twenty more years.

Sixth. The Eisner & Mendelson Co. agrees for the whole time of this lease not to handle, neither directly or indirectly, any other bitter water of any name whatsoever, and to use their best endeavors to increase the sales of the water drawn from the bitter spring leased by them.

826 Seventh. Mr. Heinrich Mattoni agrees for the time of this lease not to sell any of his bitter waters, neither directly nor indirectly, to anybody else in the United States of North America, or Canada, nor to lease any of his bitter-water springs to anybody else for the purpose of transmarine shipments, and furthermore the lessor, Mr. Heinrich Mattoni, has no right whatsoever to use the label of the Eisner & Mendelson Co, which is their own property, for any of his bitter waters.

Eighth. The repayment of the costs to Messrs. Mattoni & Wille,

as stipulated in part IV of this lease, is effected by a credit which the Eisner & Mendelson Co. will open with a London banking concern and against which Mattoni & Wille may draw at 90 days from date of shipping against shipping documents.

Ninth. Mr. Heinrich Mattoni hereby confers upon the Eisner & Mendelson Co. the option to purchase half of his property of all the Ofener bitter springs and bathing establishments in Budapest, at one hundred thousand dollars, or the whole property at two hundred thousand dollars, United States currency, within the first five years. If, within these five years, Mr. Heinrich Mattoni should have an opportunity to sell his property to somebody else, Mr. Heinrich Mattoni is to grant to Eisner & Mendelson Co. a time of at least two months to consider the matter, and within this time the Eisner & Mendelson Co. has to decide whether or not they want to use their right of purchase.

This lease, however, is valid not only for the two parties mentioned therein but also for their legal successors; therefore, an eventual sale of Mr. Heinrich Mattoni's property of the bitter-water springs in Budapest does not invalidate this lease.

Tenth. This lease is binding for the two contracting parties, and also for their legal successors, administrators, etc., etc. If any differences or litigations should arise from this lease, the two
827 contracting parties submit to the decision of the Budapest waaren und effectenboerse (Budapest stock and bond exchange.)

Budapest.

HEINRICH MATTONI,
As Proprietor of the Spring and of the Firm Mattoni & Wille.

New York.

EISNER & MENDELSON CO.,
p. p. MORITZ EISNER, *Sec'y.*
p. p. JOSEPH MENDELSON, *Treas'r.*

UNITED STATES OF AMERICA, } ss:
City, County, and State of New York, }

Before me, the undersigned public notary of the city and county of New York, this day appeared Moritz Eisner, of a disposing condition and personally known to me, secretary of the Eisner & Mendelson Company, this city, and signed the foregoing lease, acknowledging that he instrumented and executed the same by his own free will in the name and as authorized agent of said company.

In witness whereof I have hereunto affixed my seal, and signed my name in handwriting.

New York, March 14, 1890.

OTTO P. EBERHARD,
Notary Public.

[L. S.]

No. 866. [SEAL.] [SEAL.]

Imperial and royal Austrian Hungarian consulate general, New York.

I hereby certify that the foregoing signature of Mr. Otto P. Eberhard, a public notary in this city, is genuine.

New York, March 14, 1890.

THE IMPERIAL AND ROYAL CONSUL.
ZATITULEK.

[L. S.] (Signed)

(Stamp.) G. L. 24317.

828 I hereby certify that Mr. Heinrich Mattoni, personally known to me, to be a merchant in Vienna, at present in Carlsbad, proprietor of the so-called Ofener bitter springs and partner of the firm of Mattoni & Wille in Budapest, appeared before me and put his own signature and the signature of his firm in handwriting to the foregoing document, and confirm that the changes made in ink in paragraph IX, lines 4, 5, 6, 7, 8, whereby the sums of 100,000 gulden and 200,000 gulden are changed into 100,000 dollars and 200,000 dollars respectively, had been effected before the document was signed, Karlsbad, May 10, 1890.

HEINRICH ZLOCH,
Imperial and Royal Notary.

Fees fl. 3.25.

Consulate of the United States of America at Prague.

I, Emil Kubinsky, vice-consul of the United States of America at Prague, Bohemia, do hereby certify that J. U. Dr. Heinrich Zloch, whose name is subscribed to the paper hereunto annexed was at the time of subscribing the same imperial and royal notary at Carlsbad in Bohemia duly commissioned, and that full faith and confidence are due to his acts as such.

In testimony whereof I have hereunto subscribed my [SEAL.] name and affixed the seal of the consulate in the city of Prague, the fifteenth day of May, 1890.

EMIL KUBINSKY,
Vice-Consul of the United States of America.

No. 84. Fee $2.

829 NEW YORK, *August* 31, 1894.

Mess. Mattoni & Wille, Budapest, to the hands of Mr. Heinrich Mattoni, Gieschuebl Puchstein.

GENTLEMEN: We hereby beg to inform you that, in accordance with part V of our lease, dated May 10th or 15th respectively, we prolong the same under the same terms for twenty more years, that is from March 1, 1895, on.

We remain, gentlemen, truly yours,

EISNER & MENDELSON COMPANY,
Per MORITZ EISNER.

POST-OFFICE, NEW YORK, N. Y., V.

Registered letter No. 309.
Parcel:

Received August 31st, 1894, of Eisner & Mendelson Co., a letter, addressed to Heinrich Mattoni.
Parcel:

Giesshuebl,
near Carlsbad.
C. W. DAYTON, *P. M.*,
Per BURNHAM.

DEFENDANT'S EXHIBIT UNGAR CONTRACT, ENGLISH TRANSLATION.

Contract entered on May 2d, 1892, between the Eisner & Mendelson Co., of New York, party of the first part, and Ignatz Ungar & Sohn, of Budapest, party of the second part, as follows:

830 1.

The owners of mineral springs, Messrs. Ignatz, Ungar & Sohn hereby grant unto the Eisner & Mendelson Co., of New York, 6 Barclay street, the sole agency for their bitter-springs products: Hunyadi Arpad, Hunyadi Bela, Victoria and Racoczy Gyorgy, for the whole territory of the United States and Canada for six succeeding years.

2.

The Eisner & Mendelson Co. is bound to take the following quantities, viz:

In 1892 at least 2,500 cases each 50 bottles,
In 1893 at least 5,000 cases each 50 bottles,
In 1894 at least 5,000 cases each 50 bottles,
In 1895 at least 5,000 cases each 50 bottles,
In 1896 at least 4,500 cases each 50 bottles,
In 1897 at least 4,500 cases each 50 bottles,

f. o. b., Budapest, delivered at the railroad depot, at the following prices, net cash, no discount, viz., the first two thousand cases at oewfl. 7.50–, the second two thousand cases at oewfl. 7.–, the following 1,000 or 500 cases respectively at oewfl. 6.50– per case.

3.

Upon the signing of this contract the Eisner & Mendelson Co. pays an instalment of oewfl. 1 per case, which is to be deducted at the rate of oewfl. 1 per case when delivery of the said minimum quantities is made.

4.

A similar payment is to be paid by the Eisner & Mendelson Co. for the whole length of this contract at the rate given in part 3. These payments become due in the month of January of each year. Therefore, the amount due in 1892 is oewfl. 2,500.–, in 1893, 1894 and 1895, oewfl. 5,000.– each year, in 1896 and 1897 oewfl. 4,500.– each year.

831 5.

If, in any year during the existence of this contract, the Eisner & Mendelson Co. should not order the said minimum quantities, the above-stated payments shall not be refunded to the Eisner & Mendelson Co., but shall be considered as the amount of indemnity due to the owners of springs, Messrs. Ignatz Ungar & Sohn, for not ordering the herein-stipulated quantities; furthermore, if the said minimum quantities during any year should not be bought, Messrs. Ignatz Ungar & Sohn shall be entitled to declare this contract null and void and arrange otherwise in regard to the sales of the water.

6.

The Eisner & Mendelson Co. is bound to take at least 1,500 cases on account of the said minimum quantities within the first six months of each year.

7.

If, however, by pushing the goods, these brands should have larger sales, the Eisner & Mendelson Co. shall be entitled to order further quantities at the following prices: 500 cases to complete a lot of 5,000 cases at oewfl. 6.50–, the sixth 1,000 cases at oewfl. 6.–, the seventh 1,000 cases at oewfl. 5.50–, and the eighth 1,000 cases at oewfl. 5.– each case, and further quantities at the average amount of the said 8,000 cases, viz., at oewfl. 6.50– each case, and Messrs. Ignatz Ungar & Sohn agree to fill such orders at these prices.

8.

The Eisner & Mendelson Co. is to protect the trade-marks of Ignatz Ungar & Sohn, in America, and to use their best endeavors to introduce the same successfully.

9.

832 In reference to New England the firm of Ignatz Ungar & Sohn is under contract with Messrs. Cutler Bros. & Co. of Boston, Mass. For the term of this contract the Eisner & Mendelson Co. takes the place of the owners of the spring in reference to their rights and obligations resulting from said contract. If, for any reason whatsoever, the contract with Messrs. Cutler Bros. & Co. should be declared null and void, the territory of New England shall be included in this contract, making the Eisner & Mendelson Co. sole agents for the United States of America, Canada, and also in New England.

10.

If, in any year of this contract the Eisner & Mendelson Co. should purchase more *more* than the stipulated lowest quantities, this additional purchase shall not be included in the quantities due to be taken during any other year.

11.

The owners of the springs sell f. o. b. Budapest, therefore the goods are shipped at the risk of the Eisner & Mendelson Co. The

Eisner & Mendelson Co. has to arrange for freight, duty, insurance, and to stand all loss resulting from breakage or frost. It remains the duty of the spring-owners to deliver the cases containing 50 bottles each, in proper shape and make-up, and well packed.

12.

The total sales of all those Hungarian Hunyadi springs the agencies for which are or will be in the hands of the Eisner & Mendelson Co. must never exceed the total sales of bitter water from Ignatz Ungar & Sohn sold by the Eisner & Mendelson Co. in their territory. Consequently, if the Eisner & Mendelson Co. should sell 10,000 cases of Hunyadi Matyas, Hunyadi Laszlo, etc., etc., in one year, the said firm shall be bound to place the same quantity of Ignatz Ungar & Sohn's mineral waters.

833

13.

In order to enable Ignatz Ungar & Sohn or their representatives to have an insight as to the sales, the Eisner & Mendelson Co. agrees to let them have access to their books, and to use their best endeavors to facilitate such a control.

14.

Messrs. Ignatz Ungar & Sohn are allowed to also appoint other representatives in the United States of America and Canada for bitter-water brands, not named in this contract, and not bearing the name Hunyadi. Messrs. Ignatz Ungar & Sohn, however, shall not be allowed to sell these waters for less than oewfl. 6.50 per case, and the spring-owners shall be bound to pay the amount they receive in excess of oewfl. 5. per case of these waters over to the Eisner & Mendelson Co. for advertising the Hunyadi Arpad spring.

15.

This contract is to take effect on the same day it is signed, and before signing this document the Eisner & Mendelson Co. has to see that the agreements between Ignatz Ungar & Sohn and M. & J. S. Perrine, Philadelphia, Pa., dated January 26, 1889, and April 5, 1889, respectively, are cancelled. The current year shall be the first full year, expiring on December 31, 1889, and the length of this whole contract shall be terminated on December 31, 1897.

16.

In case that the Eisner & Mendelson Co.'s business or the springs of Ignatz Ungar & Sohn should be sold, this contract is transferred to the respective legal successors.

17.

If, in the sixth year of this contract the Eisner & Mendelson Co. should take 8,000 cases, a prolongation of this contract for five more years is hereby stipulated.

834 18.

In case of a trade-mark lawsuit the Eisner & Mendelson Co. as well as Ignatz Ungar & Sohn agree to defend the matter, for the whole length of this contract, and to share the expenses equally.

19.

This contract is not transferable on part of the Eisner & Mendelson Co. without the consent of Ignatz Ungar & Sohn, because the latter firm is desirous to provide that the business shall not fall into the hand of a competitor.

20.

Force majeure excludes obligations of both parties; considered as force majeure also is a strike resulting into such an increase of the price for bottles which is not in conformity with the present prices for bottles upon which the prices for the goods of this contract are calculated.

21.

In case of difference the parties shall submit to the respective Budapest courts, if Ignatz Ungar & Sohn shall be the defendants, and to the respective New York courts, if the Eisner & Mendelson Co. shall be the defendant.

This contract is made and agreed upon on the 2d of May, 1892, personally signed by the two parties, and confirmed by their seals put thereto.

EISNER & MENDELSON CO.
IGNATZ UNGAR & SOHN,
Per JOS. UNGAR.

835 DEFENDANT'S EXHIBIT PERRINE AGREEMENT.

Know all men by these presents, that we, the undersigned, Matthew Perrine and J. S. Perrine, composing the firm of M. & J. S. Perrine, of Philadelphia, Pa., hereby sell, transfer and assign our agency for Ungar's Hungarian Hunyadi Arpad bitter water to Eisner & Mendelson Co., of New York, in consideration of the payment of two thousand five hundred dollars, the receipt of which is hereby acknowledged, and in further consideration of the following:

First. Eisner & Mendelson Co. agree to buy all our stock now in warehouses throughout the United States, excepting the stock we now may have in Philadelphia, for the price of $5.50 per case, storage and etc. to be paid by us thereon to date.

Second. Eisner & Mendelson agree to make payments for stock as follows: One-third part cash, one-third part a one-month's note and one-third part a two-months' note, payable in bank with interest at 6 per cent.

Third. We, M. & J. S. Perrine, agree to turn over to Eisner & Mendelson Co. all orders which we may directly or indirectly

receive for the Hunyadi Arpad water, from any part of America excepting such orders as we may receive from the States of Pennsylvania, Maryland and the District of Columbia. We also agree to turn over those orders which we may receive from Pennsylvania, Maryland and the District of Columbia to Eisner & Mendelson Co., after the first of July, 1892, or at any date prior to July 1st, 1892, provided we shall have sold our stock now on hand, and provided that Eisner & Mendelson Co. will turn over to us all such orders for delivery which they may receive from the States of Maryland,
Pennsylvania, and the District of Columbia, until such time
836 as our stock now here may be exhausted, and not longer than the first day of July, 1892.

Fourth. We agree, provided that Eisner & Mendelson shall do so also, until the first day of July, 1892, not to sell any Hunyadi Arpad water in the States of Pennsylvania, Maryland and the District of Columbia under the following prices, viz., one case at $8.50; five cases at $8.00; ten cases at $7.50 per case at one month's credit or one per cent. off for cash in ten days, and no other terms.

Fifth. We, M. & J. S. Perrine, agree till the first day of May, 1894, not to take the agency, sell, represent or push the sale of any other Hunyadi water, but such as we may buy or receive for representation from the Eisner & Mendelson Co. at a price not higher than $6.50 per case of 50 bottles, delivered f. o. b. in Philadelphia, in not less than car-load lots at thirty days' credit or one per cent. off for cash in ten days.

Sixth. Should arrangements to such effect as stated in article 5th be consummated between Eisner & Mendelson Co. and ourselves, we agree not to sell such Hunyadi waters as we might buy from them at any other prices and terms than they might have established to the trade or in other words, at no other than market prices.

Seventh. It is further understood that Eisner & Mendelson Co. are to protect us on all such contracts which we have made for subagencies in any part of the United States, and accept such contracts and their responsibilities as entered into by us for subagencies, above mentioned.

Eighth. The covenants, agreements and stipulations herein contained shall be binding upon ourselves, Eisner & Mendelson Co., as well as our successors, assigns, executors or administrators.

In witness whereof: we have hereunto set our hands and
837 seals this twenty-ninth day of April, one thousand eight hundred and ninety two (1892) A. D.

MATTHEW PERRINE, [L. S.]
J. S. PERRINE, [L. S.]
Trading as M. & J. S. Perrine.

Signed before witnesses:

JOS. UNGAR.
A. E. STOCKTON.

DEFENDANT'S EXHIBIT UNGER LETTER, ENGLISH TRANSLATION.

Agreement.

BUDAPEST, *May* 4, 1893.

This day the following agreement has been made between Mr. Ludwig Oliven, as representative and attorney of the Eisner & Mendelson Co. of New York, and Ign. Ungar & Sohn of Budapest.

As Messrs. Ign. Ungar & Sohn are negotiating in regard to the sale of their Ofener spring property, the agreement existing between Messrs. Eisner & Mendelson, N. Y., and Messrs. Ign. Ungar & Sohn, Budapest, dated May 2, 1892, and the appendix thereto, shall be cancelled under the following conditions:

(1.) Three days after the sale of their springs, Messrs. Ign. Ungar & Sohn, pay the indemnity of ten thousand dollars, as stipulated in the contract to the Eisner & Mendelson Co. into the hands of Mr. Ludwig Oliven against delivery of the original contract.

(2.) Before rendering the spring to the purchaser, Messrs. Ign. Ungar & Sohn have to deliver to Messrs. Eisner & Mendelson still 1,340 cases water so that the total deliveries of 1893 shall amount to 20 car-loads, or 2,680 cases. Messrs. Eisner & Mendelson have to receive these 2,680 cases at the average price of fl. 6.50 a case.

838 (3.) The installment of fl. 5,000 as stipulated in the contract will be placed upon the account of the said twenty car-loads.

(4.) In case of the negotiations of Messrs. Ign. Ungar & Sohn should not result in a sale up to June 15, 1893, this agreement shall be considered null and void, and the original contract and appendix shall take effect again.

EISNER & MENDELSON COMPANY.
IGN. UNGAR & SOHN.
LUDWIG OLIVEN, *Attorney.*

DEFENDANT'S EXHIBIT UNGAR LETTER, JULY 6TH, 1893, ENGLISH TRANSLATION.

BUDAPEST, *July 6th*, 1893.

GENTLEMEN: We have the honor to inform you that we have this day sold and rendered to Mrs. Andreas Saxlehner, owner of the firm of Saxlehner, our Ofener bitter-springs establishment, consisting of the following springs:

Victoria, Hunyadi Arpad, Rakoczy, Gyorgy, Hunyadi Bela and Attila, including the plant, all licenses and trade-marks, and that we retire thoroughly from the mineral-water business.

We will balance the accounts of our bitter-water enterprise ourselves so that Mrs. Saxlehner does not enter into any one of our respective engagements.

We deem it a pleasant duty to thank you for the confidence you have placed into us for such a number of years, and recommending you to our successor, we remain,

Yours very truly, IGN. UNGAR & SOHN.

839 DEFENDANT'S EXHIBIT SAXLEHNER 1876 NOTICE, ENGLISH TRANSLATION.

BUDAPEST, *February*, 1876.

I beg to inform you that I have made over to the Apollinaris Company, Limited, 19 Regent street, London, the introduction of my Hunyadi Janos bitter water in England, her possessions and colonies, as well as in all transmarine countries, and have accordingly also granted them the exclusive sale in these countries.

For this reason, and as for the countries mentioned, other labels are in force, being also registered, I find myself obliged to most politely request you not to execute orders from the district of the Apollinaris Company, but, in your friends' interest, to send them to me, as otherwise, with the label with which you are familiar, you have to expect objection.

Most respectfully,

(Signed) ANDREAS SAXLEHNER.

DEFENDANT'S EXHIBIT LASZLO CONTRACT NO. 1.

Translation.

PARIS, *March* 30, 1892.

Mr. Moritz Eisner, of Eisner & Mendelson, Hotel Bristol, Berlin.

DEAR SIR: We beg to acknowledge receipt of your favor of the 26 inst., and thank you for the two Hunyadi Arpad labels on blue paper which were enclosed.

Our board of directors regrets very much that you could not accept our first proposition in reference to the sale of our Hun-
840 yadi Laszlo water and on account of your price offer, which is really too low, still anxious to enter into business relations with your honorable firm, asks us to make you another proposition which we hope you will accept.

We agree to give you the monopoly for the sale of our Hunyadi Laszlo water for the United States and Canada for a period of five successive years to begin on May 1st, this year, under the following conditions:

You have to take a minimum quantity of 500 cases each containing 50 bottles, in the first year, that is from May 1, 1892, to May 1, 1893, and a minimum quantity of

600 cases in the second year,
700 cases in the third year,
800 cases in the fourth year,
900 cases in the fifth year.

We bill you the case at fl. 7.25, or francs 15.95.

PARIS, *March* 30, 1892.

M. E——2——.

Franco Budapest.

The bills shall be payable after three months from date, by check on Paris, gold francs.

The orders must call for at least hundred cases at a time.

In case of non-execution of these conditions this contract may be declared null and void without any prejudice as to damage interests.

You see that the difference between our offer and your price of fl. 7 (francs: 15.40) is only a quarter of a gulden (francs: 0.55) that is a very small one in consideration of the sacrifice which we make on our ordinary price. We also hope that this proof of good will on our part will lead you to follow our example and to allow us this little difference.

Please let us know your decision in this matter by return mail, and hoping to receive a favorable reply, we remain,

Yours very truly,

CO. GENERAL D'EAUX MINERALES ET DE BAINS DE MER.

841 DEFENDANT'S EXHIBIT HUNYADI LASZLO CONTRACT No. 2.

Translation.

PARIS, *April* 5, 1892.

Mr. Moritz Eisner, of Eisner & Mendelson, S. S. Normania, Southampton, England.

DEAR SIR: We beg to acknowledge receipt of your favor, dated Berlin, 2d inst.

We agree with the contents of your letter, that is to prolong for five years the contract referred to in your letter of last March 30th, under the following conditions: if you take at least one thousand cases in the fifth year of our contract (instead of the nine hundred as stated in said contract) you are to have the monopoly of our Laszlo water for another period of five years, during each of which you have to take a minimum quantity of ten per cent. superior to the number of cases of the preceding year.

It is understood that we mutually agree to the conditions of the market, as referred to in our letter of March 30, and in this letter.

We have transmitted your first order to Budapest, and shall advise you as soon as we ship same.

Yours very truly,

CO. GENERALE D'EAUX MINERALES ET DE BAINS DE MER.

842 DEFENDANT'S EXHIBIT HUNYADI MATYAS 1888 SUIT.

New York Supreme Court, New York County.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDRES, Defendant. } Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within

twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated February 10th, 1887.

HENRY MELVILLE,

Plaintiff's Attorney; Office, No. 2 Wall Street, New York City.

Post-office address, 2 Wall St.

843 New York Supreme Court, New York County.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDRES, Defendant.

And now on the 11th day of February, 1887, upon the bill of complaint herein duly verified, praying for an injunction against the above-named defendant, and on the affidavits of Isidor Holdenstein and Albert Plaut, hereto annexed, and on security being given in the sum of five hundred dollars and on its appearing that said plaintiff is entitled to the exclusive use of the word symbol "Hunyadi Janos" applied to mineral water as a trade-mark and that the said defendant has infringed said trade-mark by applying to mineral water the word symbol "Hunyadi Mathiasquelle" or Hunyadi Matyas and has also imitated the said plaintiff's bottles, labels and capsules, on motion of Henry Melville, attorney for said plaintiff

It is ordered, that pending this suit and until the further order of this court, the above-named defendant, his servants, agents, attorneys and workmen, and each and every of them be, and they hereby are restrained and enjoined from manufacturing, procuring, parting with, selling, attempting to sell or advertising for sale within the United States of America any water or liquid not coming from the Hunyadi Janos spring, referred to in said bill and complaint under the name or designation Hunyadi Mathiasquelle or Hunyadi Matyas or any name or designation in which the word "Hunyadi" occurs,

844 and also from procuring, parting with, selling, attempting to sell or advertising for sale within the said limits, any water or liquid not coming from the said Hunyadi Janos spring, in any bottle or vessel imitating or resembling in form, color and general appearance those used, as set forth in the said bill of complaint, by the said plaintiff or bearing upon it any capsule stamped in a manner imitating or resembling the capsules or any label in form, color, design and general appearance imitating or resembling the labels of said plaintiff, referred to in said bill of complaint and a fac-simile of said labels being hereto annexed, and also from procuring, parting with, selling, attempting to sell or advertising for sale within said limits, any water or liquid whatever, put up or contained in bottles resembling and bearing capsules, marks and labels resembling those of the said plaintiff herein referred to and bearing on the labels the word "Hunyadi."

GEORGE P. ANDREWS, *J. S. C.*

(Label attached hereto.)

845 New York Supreme Court, New York County.

THE APOLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDRES, Defendant.

CITY, COUNTY, AND STATE OF NEW YORK, *ss.*:

Isador Haldenstein, being duly sworn, says, I reside at No. 215 East 106th street, in said city, and am in the employ of Frederick De Bary & Co., of 43 Warren street, in said city, wholesale dealers in mineral waters, my position being that of general manager of said mineral-water business.

The said firm for upwards of nine years have been sole agents of the said plaintiff in the United States for the sale of the Hunyadi Janos mineral water, a natural water coming from a certain spring in the Kingdom of Hungary, and during the last seven years of that time I have been familiar with the style of bottling and labelling used for said water, which style has remained unchanged since the commencement of the aforesaid agency. About the first of October, 1886, I learned that the defendant was advertising for sale a Hungarian mineral water under the name Hunyadi Mathiasquelle or Hunyadi Matyas and at once caused a bottle of said last-named water to be purchased of the said defendant by one Charles L. Parigot, which bottle bearing the signature of said Parigot I have also marked with my name for identification and am ready to produce in court.

Hoping to avoid legal proceedings, I at once notified the
846 said defendant that such use by him of the word Hunyadi was an infringement of the trade-mark of the said plaintiff in the word symbol "Hunyadi Janos" as applied to mineral waters and requested him to desist from the same. After protracted negotiations, the said defendant promised to desist.

Subsequent to such promise, I requested of him a written guarantee that he would not sell or advertise for sale any water under the name Hunyadi Matyas or Hunyadi Mathiasquelle, without notice to the said Frederick De Bary & Co., which he absolutely refused but still promised not to infringe the trade-mark further.

I am now informed and verily believe that since and notwithstanding such last-mentioned promise the defendant did continue to advertise mineral water for sale under the name or designation Hunyadi Mathiasquelle or Hunyadi Matyas.

I believe that the style of bottling and labelling of said last-named water in connection with said name is intended and calculated to deceive the public into thinking that that water is the same as the Hunyadi Janos water coming from the said plaintiff and thereby to cause them great loss and damage.

I believe that the said plaintiff has already suffered great loss and damage from such sale and advertisement by the said defendant and if the same is not prevented by the injunction of this honorable court, said damage will be irreparable.

ISADOR HALDENSTEIN.

Sworn to before me this 10th day of February, 1887.

E. K. CAMP,
Notary Public, N. Y. Co.

847 New York Supreme Court, New York County.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDRES, Defendant.

STATE OF NEW YORK,
City and County of New York, } ss:

Albert Plaut, being duly sworn, deposes and says that he resides at No. 408 West 57th street, in the city of New York, and is a member of the firm of Lehn & Fink, in the said city, wholesale druggists, dealing extensively in mineral waters in general for a long number of years and that he personally has had an extended experience with the mineral-water trade, and is well competent to speak thereof.

Deponent further says that other than the well-known Hunyadi Janos water he has not known any bitter water under any name of which the word Hunyadi forms a part, except of late what is termed Hunyadi Arpad water, now the subject of a suit by the said company; and that the said Hunyadi Janos water is commonly designated by the trade by the single word Hunyadi, and that when any person orders Hunyadi from a mineral-water dealer he expects and is served with Hunyadi Janos water.

Deponent further says that the bitter water of Mattoni has been known to him under the name of Royal Hungarian water and that he is now informed and believes that attempts have been made to place on the American market the aforesaid Royal Hungarian bitter water under the name Hunyadi Mathiasquelle and Hunyadi Matyas and that the labels bearing the last-mentioned names re-
848 spectively being shown him, he believes those labels are used and intended to deceive the public and to induce people to purchase water so labeled in the belief that it is Hunyadi Janos water.

ALBERT PLAUT.

Sworn to before me this 10th day of February, 1897.

OTTO MAIER,
[SEAL.] *Notary Public, N. Y. Co.*

849 New York Supreme Court, New York County.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAS. ANDRES, Defendant. } In Equity.

For a complaint the said plaintiff respectfully shows the court:

First. That the plaintiff is a corporation duly organized under the laws of the Kingdom of Great Britain and Ireland, doing business in said Kingdom, and also in the United States of America,

having its office and principal place of business at London, England.

Second. On information and belief that said defendant is a dealer in mineral water, residing and doing business in the city and county of New York.

Third. That one Andreas Saxlehmer, of the city of Pesth, in the Kingdom of Hungary and Empire of Austria, is and was at all times herein mentioned and for many years prior thereto, the proprietor of a certain natural mineral spring, situated in said Empire, the waters of which possess valuable medicinal qualities. That long ago the name of "Hunyadi Janos" was bestowed upon said spring by the owner thereof, and thence hitherto said spring has been known and called by said name, and the water drawn therefrom has long been and is now known and called by the name of "Hunyadi Janos," which is in no way descriptive of the nature or quality of the water of the said spring,—the same being the name of
850 a local popular hero,—but was adopted by the said proprietor as a fancy or ideal name and as a trade-mark to distinguish the water of the said spring in commerce from all other waters.

Fourth. That heretofore, and many years ago, the said Andreas Saxlehner, as owner as aforesaid, sold and granted to said plaintiff the sole and exclusive right to export the said "Hunyadi Janos" water to the United States of America and vend the same therein, which grant now exists in full force and effect, and covers and extends over many years yet to come.

That by said grant and sale the said plaintiff became and was, and at all times since has been, and now is, entitled in the United States and in its business under said grant, to the exclusive use of the said fancy or ideal name as applied to said water and of said trade-mark, "Hunyadi Janos."

Fifth. That the said plaintiff, upon receiving said grant, entered largely into the enterprise of exporting said water to the said United States, and established, conducted and built up a large traffic and business in exporting to said the United States, vending therein said waters and has at all times ever since used and now uses the said trade-mark in said business, and a label, as hereinafter stated, on each bottle, showing the same with marked and characteristic colors and devices. The bottles wherein said water is so transported and sold are uniform and peculiar in size, shape and appearance and each of them has, besides the label, a stamped metal capsule and other characteristics distinguishing said bottles, as will clearly appear from specimens of the same produced in court.

Sixth. That pursuant to said sale and grant and to regulate and protect the respective rights of the parties thereto, a label for use in the United States was devised and adopted, showing the words
851 "Hunyadi Janos," and also certain designs. That said label has, at all times since the adoption thereof, been affixed to every bottle of said water taken from said spring by or for the said plaintiff and transported to and sold in the United States, and the following words in the English language appear thereon: "Sole ex-

porters: The Apollinaris Company, Limited, London." And also the following:

"Imitation of this water or of the label or of the capsule, will be the subject of legal proceedings at the instance of the Apollinaris Company, Limited, 19 Regent street, London."

And the said Saxlehner, for the purposes above stated, and especially for the purpose of giving notice to the world of said grant, caused to be registered in the Patent Office, at Washington, District of Columbia, the description and characteristic part of the said label affixed and adopted as aforesaid, containing, among other things, the said trade-mark, "Hunyadi Janos," and the words last above quoted.

Seventh. That previous to the said sale and the said grant the said mineral water was comparatively but little known in the United States, and was first generally introduced therein and sold in large quantities by the said plaintiff after said grant and upwards of nine years ago. That through the efforts, expenditures and investments of the said plaintiff the said water has become widely known in the United States, and is at present sold therein by it and its vendees in very large quantities.

That by reason of the said sales by it and the said words upon the said label by it adopted as aforesaid, dealers in mineral waters and the purchasers and consumers of said water generally, have come to know, and have long known, that the said plaintiff has the exclusive right in said United States to furnish and sell the said mineral water under the said trade-mark "Hunyadi Janos," and under the said label; and that the water so furnished and sold by it in
852 the United States is procured directly from the spring aforesaid, and therefore to rely upon the said label and said trade-mark and upon the fact that the said water so marked and labelled was and had been furnished and sold by said plaintiff, as an assurance and guarantee of the genuineness, strength and purity of the said water, and the plaintiff alleges that said assurance and guarantee was of great value to it and to said dealers and consumers. That said water so sold has come generally to be known and designated by the trade, so called, and by purchasers and consumers, by the first and characteristic word of said trade-mark, "Hunyadi," the "Janos" being comparatively seldom used in common parlance.

Eighth. Upon information and belief, that the defendant above named, well knowing the premises and the rights existing in and secured to the said plaintiff, as aforesaid, but contriving to injure the plaintiff and to deprive it of the benefits and advantages which might and otherwise would accrue unto it from the enjoyment of such rights, and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsule, before the commencement of this suit, without license or allowance, and against the will of the plaintiff; in violation of the rights and infringing the said trade-mark, did unlawfully and wrongfully manufacture or procure, certain bottles in color, form, design and general appearance identical with those used as aforesaid by the plaintiff, and did place or cause to be placed or used upon them cer-

tain capsules stamped in a manner closely resembling those used as aforesaid by the plaintiff, and certain labels in form, design and general appearance as imitation of those adopted as aforesaid by it, and did sell the said bottles thus capsuled and labeled and filled with water under the name and description of Hunyadi Mathiasquelle or Hunyadi Matyas water, and also threatens and in-
853 tends, to continue in like manner to manufacture or procure and sell the same. And the plaintiff further shows that the similarity between the said bottles, capsules, labels and names used respectively by it and the defendant, is so great that the public and consumers and purchasers are likely to be deceived thereby and to suppose the bottles so sold by the said defendant to be those obtained by the plaintiff, directly from said spring and thereby to suffer great loss and damage.

That the plaintiff has at all times since acquiring the said grant and rights diligently sought to discover and arrest any attempt to impair or infringe the same by the importing into or sale in the United States by any other person or firm of any water bearing its aforesaid trade-mark or label or imitations thereof.

Ninth. That by reason of the said acts done or threatened and intended to be done by the said defendant all in defiance of the rights of the plaintiff, as aforesaid, great and irreparable loss and injury has been, is and will be caused to it, and it has been, is, and will be deprived of great gains and profits, which might and otherwise would, be obtained and enjoyed. And the plaintiff is informed and believes that the said defendant, by reason of the said sales of the said water under the said name "Hunyadi Mathiasquelle or Hunyadi Matyas," and the said label and capsule, has made and realized large profits and advantages and now has in his possession or under his control, or subject to his order, a large quantity of said water so bottled, capsuled and labeled, which he proposes to sell.

And the plaintiff further says, that such sales made by the said defendant, and the threats and intention of defendant to make such future sales, and said unlawful acts in disregard and defiance of the plaintiff's rights, have the effect to, and do encourage and induce others to interfere with said trade-mark and label and to violate and disregard the plaintiff's rights.

854 Tenth. That by reason of the premises the plaintiff has been injured to his damage in the sum of ten thousand dollars.

Wherefore the plaintiff demands judgment against the defendant:

(1.) That the said defendant, his servants, agents, attorneys and workmen and each and every of them, may be restrained and enjoined, provisionally and permanently by the order and injunction of this honorable court, from manufacturing, procuring, parting with, selling, attempting to sell or advertising for sale, within the United States of America, during the continuance of the rights of the plaintiff aforesaid, any water or liquid not coming from the said Hunyadi Janos spring, under the name or designation Hunyadi Mathiasquelle or Hunyadi Matyas, or any name or designation in which the word "Hunyadi" occurs, and also from procuring, part-

ing with, selling, attempting to sell or advertising for sale, within the said limits any waters, not coming from the said Hunyadi Janos spring in any bottle or vessel, imitating or resembling in form, color and general appearance those used as aforesaid by the plaintiff, or bearing upon it any capsule stamped in a manner imitating or resembling the said capsules of the plaintiff, or any label in form, color, design and general appearance imitating or resembling the said label of the plaintiff, or the said bottles of Hunyadi Janos water and also from procuring, parting with, selling, attempting to sell or advertising for sale, within said limits, any water whatever, put up or contained in bottles resembling and bearing capsule marks and label resembling those of the plaintiff and bearing on the label the word "Hunyadi."

(2.) That the defendant may be decreed to deliver up unto the plaintiff any and all labels in his possession, or under his control, upon which the word "Hunyadi" appears, or which are made
855 in imitation of or resemble those adopted and used by the plaintiff, and any and all bottles, whether filled or unfilled, and all capsules which imitate or resemble the bottles and capsules used by the plaintiff for said "Hunyadi Janos" water, and to account for and pay unto the plaintiff, all profits derived by the said defendant from the sale of any water under the said name "Hunyadi Mathiasquelle or Hunyadi Matyas," or any name or designation in which the name "Hunyadi" appears, or any vessel upon which was or is affixed a label or capsule resembling that adopted and used as aforesaid by the plaintiff, or from any imitation of the plaintiff's said trade-mark and label.

(3.) For ten thousand dollars damages.

(4.) For the costs of this action.

(5.) For such other relief or such further relief as to the court seem just.

By its attorney, HENRY MELVILLE,
No. 2 Wall Street, New York City.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Adolphe de Bary being duly sworn, deposes and says: He is a member of the firm of Frederick de Bary & Co., of said city and that said firm is still agent for the above-named plaintiff in the United States of America for the sale of "Hunyadi Janos" water. That he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except the matters therein said to be alleged upon information and belief and as to those matters he believes it to be true. That the sources of his knowledge and the grounds of his belief are an intimate and personal acquaintance now and for years past with the affairs, business and transactions of the said company particularly in the
856 said United States; having personally conducted, managed and received the importation of said "Hunyadi Janos" water into the said United States for the said plaintiff; his long familiarity with labels, trade-marks, bottles and packing used in

said business by the said plaintiff; his having discovered and ascertained the presence in and importation into the United States of the label "Hunyadi Mathiasquelle," or "Hunyadi Matyas," referred to in the said complaint; his having recently caused to be found on sale and purchased in the said United States, bottles bearing said label "Hunyadi Mathiasquelle or Hunyadi Matyas," his having traced bottles bearing said last-mentioned label to the said defendant and ascertained that said bottles so labeled had been obtained, handled, kept, bought, sold and disposed of by the said defendant, and that the other acts alleged in said bill of complaint to have been done by the said defendant, have been in fact so done; and information coming to him of acts and declarations of said defendant indicating the intention to continue to obtain by sale, dealing in and disposing of bottles, labeled as last aforesaid and to commit the other acts complained of. That the reasons that this verification is not made by the said Apollinaris Company, Limited, is because it is a foreign corporation and its officers beyond the seas.

ADOLPH DE BARY.

Sworn to before me this 10th day of February, 1887.

OTTO MAIER,
Notary Public, New York County.

857 Supreme Court of New York.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDRES, Defendant.

Answer.

The above-named defendant answering the complaint herein, says that he does not know and has not information sufficient to form a belief whether the plaintiff is a corporation as in the complaint alleged or whether Andres Saxlehner is or was the proprietor of the mineral spring in the complaint mentioned, or whether or how long ago the name of "Hunyadi Janos" was bestowed upon said spring or whether that name is that of a local popular hero or whether it was adopted by said Saxlehner as a fancy or ideal name or as a trade-mark, as in said complaint alleged, or whether said Saxlehner sold or granted to the plaintiff the sole or exclusive right to export or vend said water as in said complaint alleged, or whether said plaintiff has been or is entitled to the exclusive use of said alleged fancy or ideal name or of said alleged trade-mark, "Hunyadi Janos," as in said complaint stated, or whether the plaintiff has established, conducted or built up a large traffic in exporting and vending said water or used said alleged trade-mark or the label for that purpose in the complaint mentioned for the time or to the extent therein alleged, or whether the alleged bottles of the plaintiff are uniform or peculiar in size, shape or appearance or whether

each of them has the label or capsule or other characteristics as is in said complaint alleged or whether the label alleged to be used
858 by the plaintiff was devised or adopted, or has been affixed or registered as in said complaint alleged, or whether previous to said alleged sale or grant to the plaintiff said water was but little known in the United States and was first generally introduced therein or sold in large quantities by the plaintiff, as in said complaint alleged, or whether through the efforts, expenditures or investments of the plaintiff said water has become widely known in the United States, or is at present sold therein, as in said complaint alleged, or whether the purchasers or consumers of said water have come to know or have long known that the plaintiff has the exclusive right to furnish or sell said water under said trade-mark or label or that the water furnished and sold by the plaintiff in the United States is procured directly from the alleged spring, or whether such purchasers or consumers rely upon said label or trade-mark as an assurance or guarantee, as in said complaint alleged, or whether said alleged assurance and guarantee was or is of great value, as in said complaint alleged or whether said water has come to be known or designated by the first word of said alleged trade-mark "Hunyadi," as in said complaint alleged, or whether said word "Hunyadi" is more characteristic in said alleged trade-mark than the word "Janos" or whether said last-mentioned word is comparatively seldom used, as in said complaint alleged.

And the defendant further answering, denies that he manufactured or procured certain bottles in color, form, design and general appearance identical with those alleged to be used by the plaintiff, as in said complaint alleged, or that he placed or caused to be placed, or used upon them capsules or labels as in said complaint alleged or that he has sold or threatened to continue to sell such alleged bottles so labeled, and capsuled as in said complaint alleged, or that the similarity between the bottles, capsules, labels and names used by him and the plaintiff respectively, is so great that
859 the public or consumers or purchasers are likely to be deceived or entertain the suppositions in said complaint alleged, or that great or irreparable loss or injury has been or is or will be caused to, or great gains or profits lost by the plaintiff, as in said complaint alleged, or that the defendant has in his possession or under his control a quantity of water bottled, capsuled and labeled, as in said complaint alleged, or that he proposes to sell any such water so bottled, capsuled and labeled, or that the plaintiff has been injured as in the complaint alleged.

And this defendant further answering says, that he is and for some years past has been engaged in the sale of mineral waters in the city of New York and that Messrs. Mattoni & Wills, a firm of merchants doing business at Budapest, in Hungary, have consigned to him for sale a quantity of a certain Hungarian bitter water, known by the name of "Hunyadi Mathias," or "Hunyady Matyas," or "Hunyadi Mathias Quelle." And this defendant further answering says on information and belief, that the said water so consigned to and sold by him, is taken from a spring in Hungary which for

many years prior to 1877 and since then has been and is known by the name of "Hunyadi Mathias," the Hungarian of which is "Hunyadi Matyas;" that its owner always had and has as good a right to that name as a trade-mark as the owner of the "Hunyadi Janos" spring or his assigns or grantees ever had or have to the use of that name; that in the year 1877, when the said Mattoni & Wills became the owners of said Hunyadi Mathias spring, the water coming therefrom was well known in the market by that name and by it distinguished from other Hungarian bitter waters, including that of "Hunyadi Janos," that in the year 1877 the Emperor of Austria and King of Hungary by royal grant granted to said Mattoni & Wills permission to place upon the market all their different Hungarian bitter waters under the general name of "Ofner Royal Bitter Water," under the condition, however, amongst others, they
860 would print upon their labels on bottles which contained water from said Hunyadi Mathias spring, the name "Hunyadi Mathias," in order to distinguish the same from other bitter waters; that said royal grant has all the force of law in said Empire of Austria and Kingdom of Hungary and was and is binding upon the owner of the spring known as Hunyadi Janos, and his assigns or grantees, and that this defendant by selling said "Hunyadi Mathias" bitter water under its true and real name and under a label containing the word- "Hunyadi Matyas" or "Hunyadi Mathiasquelle," has not infringed any of the alleged rights of the plaintiff, and this defendant, further answering says, on information and belief that said plaintiff has not and cannot have a monopoly or trade-mark in the form of the bottles or capsules alleged to be used by it, because such form of bottles and capsules has been in common use by all dealers in Hungarian bitter waters in Europe and America for a great number of years and cotemporaneously and coextensively with the alleged use thereof by the plaintiff.

SALOMON & DULON,
Defendant's Attorneys, 115 Broadway, New York City.

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Fr. Jac. Andres, being duly sworn says: That the foregoing answer is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters, he believes it to be true.

FR. JAC. ANDRES.

Sworn to before me this 9th day of March, 1887.
J. S. ISAACS,
Commissioner of Deeds, New York City.

861 At a special term of the supreme court of the State of New York, held at the chambers thereof, in the county courthouse, in the city of New York, on the 31st day of July, 1888.
Present: Hon. Morgan J. O'Brien, justice.

THE APOLLINARIS COMPANY, LIMITED,
against
FR. JAC. ANDREAS.

Upon the annexed stipulation of the attorneys for the respective parties to the above-entitled action, and upon motion of Salomon & Dulon, attorneys for the defendants herein,

It is ordered that the injunction heretofore granted in favor of the plaintiff in the said action on the 11th day of February, 1887, restraining the defendant from committing the various acts therein mentioned, be, and the same is hereby vacated and set aside; that the sureties upon the undertaking upon said injunction be, and the same are hereby discharged and said undertaking is hereby cancelled and annulled; that the undertaking on the part of the plaintiff for costs of said action be and the same is hereby cancelled and annulled, and that the sureties thereon be and they hereby are discharged; and that said action be discontinued without costs to either party as against the other.

M. J. O'BRIEN, *J. S. C.*

862 New York Supreme Court, New York County.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
FR. JAC. ANDREAS, Defendant.

It is hereby stipulated and agreed that the injunction heretofore granted in favor of the plaintiff in the above-entitled action on the 11th day of February, 1887, restraining the defendant from committing the various acts therein mentioned, be vacated and set aside; that the sureties upon the undertaking upon such injunction be discharged and said undertaking be cancelled and annulled; that the undertaking on the part of the plaintiff for costs in said action be cancelled and annulled and the sureties thereon be discharged; that said action be discontinued without costs to either party as against the other; and that an order to the effect hereof may be entered hereupon by either party without notice.

Dated New York, July 30th, 1888.

HENRY MELVILLE,
Plaintiff's Attorney.
SALOMON & DULON,
Defendant's Attorneys.

STATE OF NEW YORK,
County of New York, } ss:

I, William Sohmer, clerk of the said county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original summons, affidavits,
863 complaint, answer, consent, order of discontinuance and injunction order, The Apollinaris Company, Limited, *vs.* Fr. Jac. Andres, on file in my office, and that the same are correct transcripts therefrom, and the whole of such originals.

In witness whereof I have hereunto subscribed my name and affixed my official seal, this 25th day of February, 1898.

[SEAL.] WM. SOHMER, *Clerk.*

DEFENDANT'S EXHIBIT POTTER ORDER (HUNYADI MATYAS 1888 SUIT).

At a special term of the supreme court of the State of New York, held in and for the city and county of New York, at chambers thereof, in the county court-house in said city, on the 31st day of January, 1888.

Present: Hon. Joseph Potter, justice.

THE APOLLINARIS COMPANY, LIMITED, *against* FR. JAC. ANDRES. } Order Continuing Injunction.

The defendant having moved to vacate the injunction granted in said action by Andrews, justice, and bearing date the 11th day of February, 1887, now after reading and filing said injunction and the complaint herein, together with the affidavit of Isidor Haldenstein, verified the 10th day of February, 1887, and of Albert
864 Plaut, verified on the 10th day of February, 1887, and all other papers recited in said injunction upon which the same was granted; and also on reading and filing the affidavits of Heinrich Mattoni, verified on the 12th day of January, 1887, of Fr. Jac. Andres, verified the 1st day of April, 1887, of Otto Maas, verified on the 12th day of December, 1886, and the 5th day of March, 1887, respectively, of Gustav Kahn, verified on the 4th day of March, 1887, of Heinrich Mattoni, and Emile Wille, verified the 4th day of March, 1887, of Marit Plossl, verified on the 7th day of March, 1887, of Johann Schonborn and Leo Klinger, verified the 7th day of March, 1887, all exhibits attached to said affidavits and the answer to said complaint, on which papers the said motion to dissolve was made; and also on reading and filing in opposition to said motion the affidavits of Isidor Haldenstein and Henry Melville, verified the 15th and 16th days of July, 1887, respectively, and the record and register of trade-marks No. 5144, registered in the Patent Office at Washington on the 11th day of September, 1877, by Andreas Saxlehner of Buda Pest, and all the affidavits and exhibits attached to such papers, after having heard Rudolph Dulon, Esq., of counsel for defendant, in behalf of said motion to dissolve, and Roscoe Conkling, Esq., of counsel for the plaintiff in opposition thereto, it is—

Ordered, that the said motion to dissolve the injunction granted in this action by Andrews, justice, on the 11th day of February, 1887, be and the same hereby is denied, with $10 costs to be paid by the said defendant, to the said plaintiff or its attorney, and that the said injunction stand pending this action and until the final judgment and decree therein.

Said denial is based not upon the merits, but upon the ground that the defendant virtually agreed that an injunction should con-

tinue pending a litigation between the parties to this action upon the merits.

JOS. POTTER, *J. S. C.*

865 DEFENDANT'S EXHIBIT APOLLINARIS COMPANY, LIMITED, AGAINST UNGAR, 1888, PAPERS.

At a special term of the supreme court in and for the city and county of New York, held at chambers *at chambers* at the court-house, in the said city the 9th day of July, 1897.

Present: Hon. George L. Ingraham, justice.

THE APOLLINARIS COMPANY, LIMITED,
against
JOSEPH UNGAR.

An order having been made and entered in the above-entitled action on the 11th day of February, 1887, restraining and enjoining the defendant herein during the pendency of this action, and his agents, etc., from manufacturing, procuring, parting with, selling, attempting to sell or advertising for sale within the United States of America, any water or liquid not coming from the Hunyadi Janos spring referred to in the bill of complaint herein under the name or designation of "Hunyadi Arpad" or any name or designation in which the word "Hunyadi" occurs; and also from procuring, parting with, selling, attempting to sell or advertising for sale, within the said limits, any water or liquid not coming from the said "Hunyadi Janos" spring in any bottle or vessel imitating or resembling in form, color, or general appearance those used as set forth in the complaint herein, or bearing upon it any capsule stamped in a manner imitating or resembling the capsules or any label in form,
866 color, design and general appearance imitating or resembling the labels of said plaintiff referred to in the complaint herein, and also from procuring, parting with, selling, attempting to sell or advertising for sale, within said limits, any water or liquid whatever, put up or contained in bottles resembling and having capsules, mark and label resembling those of the said plaintiff herein referred to and having on the labels the word "Hunyadi," and due notice having been given to the attorney for the plaintiff that an application would be made to this court on the second day of July, 1888, for an order vacating the said order granted herein on the 11th day of February, and dissolving the said injunction.

And the hearing of the said motion having been adjourned to the 6th day of July, 1888, by stipulation, signed by counsel for both parties, and having been again adjourned in open court, both parties being represented by counsel, until July 9th, 1888,

Now, upon the affidavits of Joseph Ungar, Erich Brunler and Julius Sornborn, filed herewith and upon all the pleadings and proceedings herein, and upon proof of due service thereof upon the attorney for the plaintiff upon motion of Bangs, Stetson, Tracy & McVeagh, no one appearing in opposition, it is hereby—

Ordered, that the order of injunction *pendente lite* granted herein on the 11th day of February, 1887, is hereby in all respects vacated and dissolved with $10 costs to the defendant.

Enter.

G. L. I.

11th February, 1897.

867 Supreme Court, City and County of New York.

THE APOLLINARIS COMPANY, LIMITED,
against
JOSEPH UNGAR.

Take notice that upon the affidavits of Joseph Ungar, verified June 20th, 1888, and the affidavits of Erich Brunler and Julius Sornborn, verified June 19th 1888, copies of which are herewith served upon you, and upon all the proceedings heretofore had herein, the defendant will move before a justice of this court at chambers thereof of the new county court-house in the city of New York on Monday, the 2d day of July, 1888, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating the injunction granted in this action on or about the 11th day of February, 1887, or for such other or further relief as may be just.

Dated June 22d, 1888.

BANGS, STETSON, TRACY & McVEAGH,
Attorneys for Defendant, 48 *William St., N. Y.*

To Henry Melville, Esq., attorney for plaintiff, 2 Wall St.

868 Supreme Court.

THE APOLLINARIS COMPANY, LIMITED,
against
JOSEPH UNGAR.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph Ungar, being duly sworn, deposes and says as follows:

(I.) I am the defendant above named and reside at 68 East 104th street, in the city of New York. I am the son and representative in the United States of Mr. Ignatz Ungar of Budapest, Hungary, who is now and for some years has been the owner and proprietor of three certain natural mineral springs, situated in Ofen or Buda, in Hungary, and called respectively "Hunyadi Arpad," "Victoria," and "Attila," the waters of which possess valuable medicinal qualities.

These names were bestowed upon the said springs by the discoverer and owner of them, the said Ignatz Ungar, with the consent and allowance of the authorities, duly constituted for that purpose by the laws of Austro-Hungary.

I have annexed to this affidavit marked A, B, C, D, E, F, G, H, and

I respectively, copies of translations of the following papers, originals of which duly authenticated according to the laws of Hungary, are all either in my possession or where they can be produced.

A. Affidavit of Ignatz Ungar, verified December 31st, 1886.

B. Affidavit of Ignatz Ungar, verified February 7th, 1887, together with the translation thereof.

869 C. Certificate of the Budapest chamber of commerce and industry, dated February 5th, 1887, reciting the proceedings taken by Ignatz Ungar to obtain a license for the sale of "Hunyadi Arpad" water.

D. Certificate of the magistrate of Budapest, setting forth the decision of the royal Hungarian minister of commerce, industry and commerce, dated October 5th, 1880, by which the right to sell his bitter waters under the name of "Hunyadi Arpad" was granted to Ignatz Ungar.

E. A similar decision by the same minister, dated October 10th, 1882, and granting the use of the names "Victoria" and "Hunyadi Arpad."

F. Certificate of the magistrate of Budapest, dated October 10th, 1882, taking (or giving) notice of the decision of the Hungarian royal minister of agriculture, industry and commerce, concerning the nomination "Victoria" and "Hunyadi Arpad," or bitter-water springs by Ignatz Ungar.

G. Certificate of the United States consul at Budapest, showing that Ignatz Ungar has the right under the laws of Hungary to sell "Hunyadi Arpad" water everywhere under that name.

H. Certificate of the chamber of commerce and industry of Budapest, dated January 3d, 1887, to the effect that the label used by Ignatz Ungar on the bottles of Hunyadi Arpad water, has been duly registered and had never been attacked and was at that date a valid and subsisting trade mark.

I. Certificate of the royal Hungarian minister of agriculture, industry and commerce, dated June 9th, 1873.

This is virtually a decision upon what in patent cases here would be called an "interference."

870 Markus applied to the to vn council for a license to use the name "Hunyadi Matyas," and this being objected to by Saxlehner, who owned the "Hunyadi Janos" spring, the license was refused, but upon appeal to the minister of agriculture, industry and commerce this decision of the town council was reversed and the license to use the name "Hunyadi Matyas" granted for the reason, among others, that the two names "Hunyadi Janos" and "Hunyadi Matyas" were so dissimilar that both could exist without prejudice to either.

Under the laws of Hungary no one has the right to sell any spring waters possessing medicinal qualities unless he has first registered the name of the said water in the office of the Royal Hungarian minister of agriculture, industry and commerce, and obtained a license from the said minister to use the name so registered. This clearly appears from the affidavit of Ignatz Ungar, hereto

annexed and marked "A." It also appears from said affidavit and it is true that the said Ignatz Ungar duly received and in pursuance with the laws of Hungary to call his spring by the name of "Hunyadi Arpad," and to sell the water coming from that spring under the name in the ordinary manner. This authority to introduce into trade this water under the name of "Hunyadi Arpad," was duly obtained on the 5th day of October, 1880, and again on the 10th day of October, 1882, as appears by the two certificates duly authenticated, hereto annexed and marked "B" and "C" respectively. There are at least five different springs in Hungary called by names of which "Hunyadi" forms a part, namely, "Hunyadi Matyas," "Hunyadi Laszlo," "Hunyadi Erzebet," "Hunyadi Arpad," "Hunyadi Janos," and all of these springs have been duly registered and licensed under the laws of Hungary, as appears under the two certificates marked "C" and "G," hereto annexed. All of these springs are bitter-water springs, possess medicinal qualities and the elements and qualities of all of them are in many
871 respects similar. The ground upon which these various springs have been licensed under their various names is fully shown by the said certificate marked "C." This is a certificate from the chamber of commerce of Austro-Hungary, stating that one Ignatz Ungar applied for license to call his spring "Hunyadi Arpad," the chamber considered it proper to grant the application, because (1) there were already four other springs in Hungary called by names of which the name "Hunyadi" formed a part and no inconvenience or trouble had arisen therefrom, and (2) the waters of Ungar's spring possessed virtually the same medicinal properties which were claimed for the other Hunyadi springs. This is further shown by the certificate hereto annexed marked "I," the purport and meaning of which is explained above.

The name "Hunyadi" is the name of a popular Hungarian hero and has simply been appropriated in Hungary to signify the bitter waters which are the peculiar product of that country. All of these waters are very similar in their medicinal properties and their effects and it is these properties that the name "Hunyadi" signifies, the particular name used with "Hunyadi," such as "Arpad," "Laszlo," "Janos," "Matyas," etc., signify the particular spring from which this medicinal bitter water is derived. That the right to use the word "Hunyadi" with reference to bitter water, is not in Hungary confined to any particular spring or person, is shown by the fact that the proper authorities have as above stated, issued a license to use that word as an appellation of bitter waters to at least four other persons besides the proprietor of the "Hunyadi" Janos spring.

I am informed and believe it to be true as stated in the affidavit of Ignatz Ungar, hereto annexed and marked "A," that no suit has ever been brought in Hungary to restrain the use of the name "Hunyadi Arpad," or to prevent or enjoin the sale of bitter
872 water under that name, but the said Ignatz Ungar has had and possessed a full and perfect right under and in pursuance of the laws of Austro-Hungary to call his spring by name of

"Hunyadi Arpad" and to sell the waters coming from that spring under that name ever since the 5th of September, 1880.

II. The statement contained in the affidavit of Albert Plant herein, verified the 10th day of February, 1887, to the effect that he is competent to speak of the mineral-water trade and that he has never known of any bitter water under any name of which "Hunyadi" forms a part with the exception of "Hunyadi Janos" and "Hunyadi Arpad," is extremely strange. If his ignorance is truly stated, then the statement of his competency is not true, because there are, as I have stated before, at least five different springs in Hungary called by names of which "Hunyadi" is a part and the water from all these springs is extensively sold in Hungary and on the continent of Europe. It is not true, as recited in said affidavit that an attempt has been made to place on the American market "Victoria" water under the name of "Hunyadi Arpad." The water sold under the name of "Hunyadi Arpad" is derived from a totally different spring from that which yields the "Victoria" water. As shown by the certificate marked "F," hereto annexed, the said Ignatz Ungar duly obtained a license for both the "Hunyadi Arpad" spring and the "Victoria" spring, and under that license he was obliged to and he always has kept the two springs totally different and sold the waters of each spring only under the name of that spring. I am informed and believe that the person named Albert Plant, who made the said affidavit, has since stated in writing and verbally that the said statement to the effect that the mineral water known as "Hunyadi Arpad," had at first been introduced here under the name of "Victoria" water, was based entirely on information received from Messrs. De Bary & Co., who are the authorized agents in this country for the plaintiff herein. A copy of a letter from the said Albert Plant is hereto annexed, marked "K."

873 It is not true that the labels used upon the bottles containing the said "Hunyadi Arpad" water sold by the defendant, are so similar in appearance *in* the labels used upon the bottles containing "Hunyadi Janos" water sold by the complainant, as to deceive purchasers or consumers.

It is true that the bottles containing the "Hunyadi Arpad" water and those containing the "Hunyadi Janos" water, are somewhat similar in size and shape, and that the capsules upon the said bottles are made of the same material, almost all the bottles containing bitter waters coming from Budapest are obtained at the same factory as those used by the "Hunyadi Janos" and "Hunyadi Arpad." Almost all of the bottles used for these different bitter waters come from the same factory, namely the factory owned by one Siemens, and are therefore the same in the case of all those waters.

There are at least fifteen springs in Buda, Hungary, producing bitter waters, and all of them use for the export trade, bottles of the same form, size and general appearance and capsules of the same material and appearance, only with a different stamp impressed hereon. It is well known that all bottles used for the various

brands of champagne are similar in size, shape and general appearance. The same is true of bottles used by the various kinds of claret, Rhine wine, etc., etc., but the stamp impressed upon the capsules of the "Hunyadi Arpad" water is totally different from that upon those of the "Hunyadi Janos." The capsules upon the bottles of the Huny-di Janos water have an impression of the same face which appears upon the label on the front of the said bottles and also the words "Hunyadi Janos, Budai Keseruviz Forras," while the capsules of the "Hunyadi Arpad" have an impression of the face which appears upon the "Hunyadi Arpad" labels, which is totally different from that upon the "Hunyadi Janos" capsules and the words "Ofner Hunyadi Arpad biter quelle."

874 The labels used upon the bottles containing the "Hunyadi Arpad" water are also totally different from those used upon the bottles containing "Hunyadi Janos" water. The latter have on the top of the label in large letters the words "Sole exporters the Apollinaris Company, Limited, London," and in the middle portion of the label the words, also in large letters "Hunyadi Janos, Budai Keseruviz Forras," underneath which is a picture of a man and beneath that the words "Hunyadi Janos mineral spring." With the exception of the words just quoted and the words "Hunyadi Janos," which appear prominently and conspicuously, every word upon the bottle is in the English language. The labels used upon the bottles containing the "Hunyadi Arpad" water have none of the marks above referred to except that the picture of a man appears thereon. But the said picture is totally different from the one upon the Hunyadi Janos label. Above this *this* picture on the labels of the "Hunyadi Arpad" water are the words "Budai Hunyadi Arpad," the latter two being in large letters and beneath them in small letters the words "Keseruviz," and beneath the picture are the words "Ofner Hunyadi Arpad bitterwasser," and upon these labels are no English words whatsoever but only Hungarian, German, French or Italian words, and there appears upon each and every label used upon bottles containing "Hunyadi Arpad" water a red cross upon a blue or white ground, and also a chemical analysis of said water, neither of which marks are upon the "Hunyadi Janos" labels.

The form, color and design used in the labels upon the bottles containing the said "Hunyadi Janos" water are not used solely to designate the said "Hunyadi Janos" water, but are and have been for many years used by the owners and vendors of various bitter waters in Hungary, and are recognized and understood by merchants and consumers as designating the general nature and quality of the waters coming from all the bitter-water springs of Hungary.

875 The said form, color and general design have been appropriated and used for labels by the owners of many different Hungarian springs besides the owner of the "Hunyadi Janos" spring. Only a few of these waters have been brought into the United States, but I have annexed to this affidavit and marked "D" a label which had been for some time and now is used upon bottles containing water taken from the spring called "Rakoczy Janos,"

which said label is of the same general form, color and design as other labels used for Hungarian bitter waters, including the Hunyadi Janos.

On the 22d of February, 1886, the said Ignatz Ungar caused to be registered in the trade-mark registration office of the Buda-Pesth chamber of commerce, two certain labels for use on the bottles of the "Hunyadi Arpad" and "Victoria" waters respectively, as appears from the certificate hereto annexed, marked "E," a true and correct translation of said certificate being also hereto annexed and marked "F." The label so registered on the said 22d day of February, 1886, is in all respects precisely similar to and the same has the label as appears upon all the bottles of the "Hunyadi Arpad" water introduced into or sold in the United States. The said label is herewith produced for the inspection of this learned court, and while I am advised and verily believe that the similarity between the said "Hunyadi Arpad" label and the label used upon the bottle containing "Hunyadi Janos" water, is not sufficiently great to deceive any one after a reasonable and proper inspection, and although I know of my own knowledge that the said label was not made or used for the purpose of deceiving consumers or purchasers or of injuring the trade of the complainants or any one else, nevertheless if this learned court should so wish and desire, I hereby offer and am ready to discontinue the use of the said label and agree henceforward to use only the label which has been for many years and now is used upon the bottles of "Hunyadi Arpad"
876 water, sold in Hungary and upon the continent of Europe, and said labels being hereto annexed and marked "G."

This said label "G" was duly registered in the registration office of the Buda-Pesth chamber of commerce and trade on the 3d day of November, 1880; permission given to use the same as appears from the certificates hereto annexed marked "H," a true and correct translation thereof being hereto annexed and marked "I."

I am informed and believe that it is true as alleged in the bill of complaint herein, that on or about 16th day of September, 1886, a final decree and injunction was obtained against P. Sherer Co., a corporation then doing business at No. 11 Barclay street, in the city of New York, in a suit brought against the said company by complainant herein, restraining the said company from manufacturing, procuring, parting with, selling or attempting to sell within the United States, any water or liquid under the name or designation of "Hunyadi Arpad." I was not a party to said action but on or about the 2d of July, I received notice from the said P. Sherer Co., who were the duly constituted agents of said Ignatz Ungar for the sale in the United States of the said Hunyadi Arpad water, by virtue of an agreement made on the 2d day of February, 1886, by and between the said P. Sherer Co. and Ignatz Ungar, through myself as his representative, that an action had been begun against said company by the complainant herein, to restrain said company from selling any water or liquid under the name of Hunyadi Arpad and that a motion for an injunction would be made on the 6th of July, 1886. The said company at the same time asked of me leave to

defend said suit at the cost and expense of my principal, Ignatz Ungar, and in reply I told them that they might do so.

On or about the 14th of July, 1886, I received a notice from said P. Sherer Co. that the said company would not allow the said suit or the said motion to be defended in their name, even at the
877 cost and expense of said Ignatz Ungar or myself. Thereupon, I tried to have myself substituted as the defendant therein, in the place and stead of said company but I was unable to have this done. As I am informed and believe, the said company notified the counsel for the complainant in that suit, Mr. Roscoe Conklin, in writing, that the said company would not allow the said suit or the said motion therein to be defended directly or indirectly and thereupon, as I am informed and believe the said motion was granted and the final decree and injunction entered therein by default and without any opposition being made thereto. No legal proceedings have ever been taken in Hungary or elsewhere prior to the beginning of this action to restrain Ignatz Ungar or any one else from selling or advertising for sale the said "Hunyadi Arpad" water or in any way attacking the use of the said name "Hunyadi Arpad" or bring in question the propriety or legality of its use by said Ungar in connection with said water.

JOSEPH UNGAR.

Sworn to before me this 20th day of June, 1888.

PATRICK A. NOLAN,
[SEAL.] *Notary Public.*

Certificate filed in New York Co.

(Stamp.) "A."

I the undersigned Ignatz Ungar of No. 1 Furdontzca Vth district of the metropolitan city of Buda Pest in the Kingdom of Hungary, of Austro-Hungarian Monarchy, by virtue of these presents and under my oath, now do declare and say as follows:

I am the effectual, legal and sole possessor and proprietor of the Hungarian Arpad bitter-water spring situated on the estates "Dobogo" and "Ormezo," of the 1 district of said Buda Pest city.

That I am in lawful possession of all the grants, licenses, and concessions delivered by the competent authorities enabling
878 me to introduce into trade the bitter water of my above-named "Hunyadi Arpad" spring.

That such trade is a registered one at the office of the wardens of the said 1 district and that the label "A" annexed to these presents be a sample of the registered label forming the trade-mark protecting my above-quoted bitter-water commerce and I declare besides that I exercise such commerce in Austria, Hungary and other lands already a considerable space of time ago freely without any hindrance. On the other side I do likewise declare under my oath:

That I until now never did introduce my said "Hunyadi Arpad" bitter waters into Great Britain and Ireland the colonies and dependencies or any part thereof; that consequently so I never applied

for a concession allowing me the introduction of said waters into said empire, nor was such an introduction or the trade of and with my Hunyadi Arpad bitter water stopped or forbidden in England or elsewhere and I make this my solemn declaration conscientiously, believing it to be true and am ready to swear it before competent authority, particularly so before the United States consul at Buda Pest.

In testimony whereof I pass this my declaration, sealed and signed it at Buda Pest aforesaid, the 31st day of December, A. D. 1886.

[SEAL.] IGNATZ UNGAR, Esq.

This is the seal and handwriting of Ign. Ungar, Esq., who passed these presents.

DR. WEISER KAROLY, *Notary.*

(*Acknowledgment in Hungarian Language.*)

That is to say:

AUSTRO-HUNGARIAN MONARCHY, *Kingdom of Hungary,* } *ss:*

Metropolitan city of Buda Pest.

I, the undersigned royal notary public, and the courts of justice, sworn English interpreter for and in said Buda Pest, my
879 place of residence, do herewith certify on ground of my notarial act No. 2989 of 1896.

Whereas, Ignatz Ungar, Esq., of No. 1 Furdontcza V district of said Buda Pest, personally known to me as proprietor of the Hunyadi Arpad Budo mineral bitter-water spring, did deliver, sign and seal the above solemn declaration for the purposes therein stated in my presence.

Whereof an act being required, I grant these presents under my notarial seal of office, and put my hand thereto.

Given at Buda Pest this 31st day of December, in the year of our Lord, one thousand eight hundred and eighty-six.

[SEAL.] DR. WEISER KAROLY.

In fidem.

CHAS. WEISER,

[SEAL.] *Not. Publ., English and French Sworn Interpreter, United States Consulate at Buda Pest.*

I, Henry Sterne, consul of the United States at Buda Pest, do hereby certify that the foregoing is true and genuine signature and seal of Dr. Charles Weiser, notary public and English and French sworn interpreter of the city of Buda Pest, Hungary.

Witness my hand and the seal of the consulate at Buda Pest, this 1st day of January, 1887.

[SEAL.] HENRY STERNE, *U. S. Consul.*

"A."

(*Label with Seals.*)

This is the label named "A" quoted on the first page of these presents.

CHAS. WEISER, *Not.*

880 "B."

Authentick Translation from the Hungarian. Copy Authentick of the Notarial Minutes.

No. 294, 1887.

Before me, Dr. Charles Weiser, a royal notary public, practicing in Buda Pest, on the date as hereinafter, appeared Mr. Ignatius Ungar, of No. 1 Bela utcza, Vth district of said Buda Pest city, with whom I am personally acquainted, knowing him to be a registered tradesman of this city, who required to take into the No. of my notarial minutes his following declaration:

Declaration.

I, the undersigned, Ignatius Ungar, a citizen of Buda Pest town, in my capacity as proprietor of the bitter-water wells called "Hunyadi Arpad" now do declare,

Whereas, in order to bring my above-named bitter-water springs into common trade, it was necessary to acquire the following documents or certificates for enabling me to continue the industries, concern and trade of my said bitter-water springs, namely:

1st. Obtained I the registration of my firm at the royal court of commerce.

2nd. I let dig the requisite wells, make the official analysis of the waters and did obtain the necessary official medical certificates.

3rd. These done, I applied to the royal ministry of the interior on behalf of the traffic in the common trade of the water under the name of "Hunyadi Arpad," and I did obtain the concession at that place under the observation that "Considering whereas, the denomination of a mineral water be not so much a moment of public salubrity as of public trade and so far my application belonging under rule 6 of the ministry royal of agriculture industry and commerce, I am to apply at latter place."

In consequence thereof,

4th. I did apply in matters of concession of said denomi-
881 nation to the said ministry for agriculture, industry and commerce and obtained the respective grant. Here I must remark that before the latter-named ministry delivered the respective concession, they questioned at the Buda Pest chamber of commerce and industry that I did only then get my above said concession when said chamber had declared that my application is not to refuse from out of trade motive. And I present here the chamber of commerce resp. certificate.

From all these it appears that I observed all legal dispositions thoroughly, in order to obtain the denomination of my spring as "Hunyadi Arpad" and that I am therefore, in rightful and legal possession of said denominations use. Concerning the mark of trade or industry, I remark that Hungarian chambers registrate such very easily, provided that the respective petitions pay down the taxes of registration. But that is not thus to understand that two different tradesmen are allowed to make use of the same trade-mark, that is to say, industrial mark, because of two or more tradesmen would register and use the same mark prior were entitled to sue the posterior, who in such a case would not only undergo the loss of his trade-mark as usurped one but were besides subject to a punishment in penal law.

The present Hungarian Penal Law Book, which has been sanctioned under 28th May, 1878, disposes in sec. 413, treating such like misdemeanors as follows: "Whosoever upon his goods, wares or merchandise or upon the wrappings thereof makes use of another Hungarian manufacturer's or tradesmen's or husbandman's or merchant's firm or trade-mark unlawfully, in order to induce into error the public concerning the origin, nature or quality of said goods, wares or merchandise, is guilty of trade-mark adulteration (falsification) and to punish with arrest until up to three months and with a fine until up to one thousand florins. The same punishment shall afflict those who are guilty of above misdemeanor
882 against a foreign manufacturer, tradesman, husbandman or merchant making unlawful use of the firm or trade-mark of such persons, provided that reciprocity exists with the State mother country of the party injured warranted by an international treaty or covenant."

The above-quoted two secs. show, that were I not in lawful possession of the "Hunyadi Arpad" denomination, whosoever were entitled to sue me and deprive me of the use of the said name. But because of my application I furnish the evidence that I obtain the legal conditions thereto, and because the above name be conform to verify I am fully entitled to said name. My adversaries had not the courage to sue me in these parts well knowing that however they might make use of pettyfogging apparatuses they must become losers of cause. And finally do I remark that expressions use by Hungarian ministry or authority in such form, as for instance, "Eszrevetel fen nem forog" (there is no remark) or "Nincs kifogasom" (I have no objection) signify conform to the Hungarian languages nature a perfect grant and are the commonly used official Hungarian expressions. And I the undersigned royal notary public, do certify whereas the documents quoted in Ignatius Ungar's above declaration have been present me that I read them and afterwards gave them back to Mr. Ignatius Ungar, having found them correct. Which documents being thus taken I read it to the party who conform it and put his hand thereto in my presence.

Given at Buda Pest the 7th day of February, one thousand eight hundred — eighty and seven.

Sig. Ungar Ignats. Sig. Dr. Weiser Karoly, roy. notary public (L. S.)

(1 flor. stamp.) By these presents I certify that this present copy athentick delivered to the said Ignatius Ungar be in all respects quite conform to my minutes made and kept at my office under 294, 1887.

883 The words "having found them correct" appear in the minutes as like manner as heretofore.

Given at Buda Pest 7 February one thousand eight hundred eighty and seven.

Legalization 95 kreus. Copy 1 flor. stp. Total: 2 flor. 95 k. (L. S.) Sig. Dr. Weiser Karoly, roy. notary public.

AUSTRO-HUNGARIAN EMPIRE, } 88:
Kingdom of Hungary, }

Metropolitan city of Buda Pest.

(Stamp) 238 folm.

I the undersigned royal notary public and the courts of justice sworn English interpreter, do herewith certify that having compared carefully the present English paper-writing with the Hungarian document hereto annexed, I now do declare on former (under my interpreter's oath) to be a correct and faithful translation of the latter.

Whereof I grant these presents to serve and avail wherever occasion may want or require. Given under my hand and seal of office at Buda Pest, 8th day of February, A. D. 1887.

In fidem, CHAS. WEISER,
[SEAL.] *Not. Publ., English and French Sworn Interpreter.*

United States consulate at Buda Pest.

I Henry Sterne, consul of the United States at Buda Pest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Charles Weiser, notary public and English and French sworn interpreter of the city of Hungary, Buda Pest.

Witness my hand and the seal of the consulate at Buda Pest this 8th day of February, 1887.

HENRY STERNE,
U. S. Consul.

[SEAL.] Notarial act 27 fee 2 dols. 5.20 fl.

884 "C."

Authentic translation from the Hungarian. Copy. The Buda Pest chamber of commerce and industry No. 277, 1887, certificate. The chamber undersigned, at the request of the Buda Pest firm Ungar Ignacz (Ignatius Ungar) proprietor of the bitter-water spring do certify officially that the said firm in the year 1880 applied to the royal Hungarian ministry for agriculture, industry and commerce or the permission to denominate from between three bitter-water

sells he opened in the first district of the metropolis (Buda) designated under "No. 3" with the name "Hunyadi Arpad" in German language "Arpad Hunyydy," which his said application pursuant to said roy. ministry order No. 2859—under 24, of September, 1880, being sent to the chamber undersigned, for obtention of an opinion, the chamber on the 29th, September, 1880, No. 2325, gave their opinion that considering whereas the water would well respective in its analysis and medical effect scarcely differs from the other Buda, bitter water further considering that in the metropolis there exists already four springs denominated "Hunyadi" without having yet caused any trouble with regard to the public or trade interests. The application seems to be grantable and further we certify that the said ministry of agriculture industry and commerce under the 5th October, 1880, No 29742, permitted the introduction of the water of the above-said well into the common trade under the denomination "Hunyadi Arpad," Buda Pest, 4th February, 1887. The Buda Pest chamber of commerce and industry. Sig. bo Kochmeiste, president. Sig. Stemacker, Oerdon, secretary (45).

(50 kreusers, stamp) N. 183 1887.

I certify whereas this present copy *be* conform to the original bearing stamps worth 1 florin *a. i.* presented me by Ignatius
885 Ungar, registered wholesale tradesman of this city, proprietor of a medical spring at Buda Pest.

Given at Buda Pest 5 day of February, 1887.

Legalization 50 kr. stamp 50 kr.—1 flor. (45) Sig. Dr. Weiser Karoly, 23 1887, tolmfsam.

AUSTRO-HUNGARY MONARCHY, *Kingdom of Hungary.* } 55.

Metropolitan city of Buda Pest..

(Stamps.)

I the undersigned royal notary public and sworn English interpreter in and for Buda Pest, do herewith certify and having compared the present English paper-writing with the document written in Hungarian language and herewith annexed in a- authentic copy and I do declare the present to be a faithful and exact translation of the latter said copy. Whereof an act being required I grant these presents under my interpreter's common seal and put my hand thereto to serve and avail where occasion m-y require.

Given at Buda Pest 5th day of February, A. D. 1887.

In fidem.

CHAS. WESIER, ESQ.,
Roy. Notary, English and French Sworn Interpreter.

Consulate of the United States at Buda Pest.

I, Henry Sterne, consul of the United States at Buda Pest do hereby certify that the foregoing is a true and genuine signature and seal of Dr. Charles Weiser, royal notary and English and French sworn interpreter of the city of Buda Pest, Hungary.

Witness my hand and the seal of the consulate at Buda Pest this 7th day of February, 1887.

HENRY STERNE,
U. S. Consul.

[SEAL.]

Notarial act 26, fee 2 dols. 5.20 fl.

Translation.

Copy.

886 The royal Hungarian ministry for agriculture, trade and commerce affairs. Dated Buda Pest, June 9th, 1873, No. 8317 B. The council of the free royal capitol, Buda in Buda. In the affair of the complaint of Andres Saxlehner *vs.* Ignatius Markus on account of the name of "Hunyadi Matyas" medical spring and bitter-water spring discovered by the latter, sent to the minister of the interior affairs on the 2nd of October last year under No. 14473 but remitted by him to me for competent disposal I notify the council of the capitol by enclosing the enclosures of its rescript, that I have found that the part of its decision in this affair date of 16th of August last year No. 11948 refusing to grant the name of "Hunyadi Matyas" spring, and bring its water into commerce under this name, the bitter-water spring discovered on his Buda Kelenfolder ground of No. 915, must be dissolved, because according to the VIII section of the law of 1872, and trade notification regularly made, cannot be made dependent from the use or prohibition of a title or (name) label should such even be a proper name, further the names "Hunyadi Janos" used by Andrew Saxlehner since a few years for the naming of his mineral spring and bitter water, &c., "Hunyadi Matyas" desired for use by Ignatius Markus cannot be considered as trade-marks, because the valid rule for the protection of trade-marks and patrons given in the 17 sec. of the custom and commercial treaty which is contained in the XVI. sec. of the law of 1867, relates to such trade-marks and patrons only, which are protected through legal disposition and registration at the competent chamber of trade, while in the present case such action was not only not done, at least such is not mentioned in the documents, but probably such thing could not be taken into consideration at all, because Hunyadi Janos and Hunyadi Matyas represents two decidedly different titles which can exist without any mutual injury against each other.

887 From a sanitary view at least, as according to the chemical opinion and upon the statement of the official chief physician the bitter water of Ignatius Markus contains the same constituents than the homogeneous kelerfolder bitter waters, it cannot exercise a different effect than the effect of Andrew Saxlehner's bitter water and therefore the use of the first in such cases of illness in which Saxlehner's could be used with good result cannot cause an injurious influence and visa versa. Corresponding to the aforesaid simply setting aside the argument brought forward as motors in favor of the prohibition, as anyhow unjustified presumptions, the use of the title "Hunyadi Matyas" mineral spring as desired by

Ignatius Markus must have been allowed to him by setting aside the unmotivated protest of Andrew Saxlehner against such, about which the concerned parties are to be notified and their documents returned.

Sig. Zichy, M. P. (L. S.)

"D."

Copy.

The magistrate of the capitale, Buda Pest, num. 41865, 1880. Decision. This high ministerial act is in copies is to be sent to the petitioner Ignaz Ungar, proprietor of bitter-water sources (borottya utcza) with the two documents then to the chief medical officer and to the administration of the first district, Buda Pest, 10th October, 1880, in the name of the vice-burguemastere, Iiamzia M. P. counsellor. Copy. Royal Hungarian ministry of agriculture industry and commerce. Num. 29742. To the represents of the capitale Buda Pest. Ignaz Ungar, inhabitant of Buda Pest, requests in his petition. Presented on the 27th August a. c. to the minister of interim affairs and transmitted to me for competent discharge, that it shall be permitted to him to name the water of the well signed with "3" of the three wells containing bitter-water sources digged in the fields Ormozo and Dobogovolgy, lying in the first district "Hunyadi Arpad," and to bring it into traffic under this name.

888 I send this petition to the represents for ulterior discharge with the observation that I have no objection against his name of the water of the well aforesaid. Buda Pest, 5th October, 1880, by order of Minister Nemeth M. P. counsellor of the ministry num. 1720, 1886.

I do certify hereby that this copy is perfectly conformed with the official copy without stamp presented by Mr. Ignaz Ungar proprietor of bitter-water sources at Buda Pest. Buda Pest on the 7th day of October one thousand eight hundred and eighty-six. Authentication. .50, copy—40, Dr. Max Furth M. P. substitute of the notary public royal Dr. Charles Weiser, confirmed by the acte num. 1886 of the notarial chamber of Buda Pest. 151, 2, 32, 1886. This translation *is* conform with the Hungarian text annexed. Buda Pest, 7th October, 1886.

Stamp. EDWARD SOMOGYI,
Stamp. *Sworn Interpreter.*

"E."

Copy. Official copy. The Hungarian royal ministry of agriculture, industry and commerce, num. 40767, of the represents of the capitale Buda Pest. Ignatz Ungar, inhabitant of Buda Pest requests in his petition presented on the 15th September a. c. sub. num. 38125, to permit *to* him to bring into traffic the water, of the two wells digged lately and containing bitter-water sources, likewise under the names "Victoria" and "Hunyadi Arpad."

I transmit the annex of this petition to the represents with the

summons to advertise the — mentioned, that I have no objection against this name of the water of the two aforesaid wells. Buda Pest 10th October, 1882, by order of the Minister Frederic Reitz M. P. num. 1722, 1886. I do attest hereby, that this copy *is* perfectly conform with the official copy without stamp presented by Mr. Ignatz Ungar, proprietor of bitter-water sources at Buda Pest.
889 Buda Pest on the seventh day of October, one thousand eight hundred and eighty-six.

Authentication.—.30 copy—.20—stamp .50=fl. 1—Dr. Max Furth M. P. substitute of the notary public royal Dr. Charles Weiser, conformed by the acte num. 1886 of the notarial chamber of Buda Pest. 158, 1, sr. 1886.

This translation *is* conform with the original Hungarian text annexed.

Buda Pest 7 October, 1886.

Stamp
Stamp

EDWARD SOMOGYI,
Sworn Interpreter.

"F."

Copy. Magistrate of the capitale Budapest. Num. 49517–1882. II. Decision of the royal Hungarian minister of agriculture, industries and commerce concerning the nomination "Victoria" and "Hunyadi Arpad" of the bitter water of the two wells digged lately by Ignaz Ungar upon his field "Ormero" at Buda. Decision. The magistrate takes notice of this ministerial decision, whose original is to be deposited in the a-chives, and a copy is to — sent with the annexes to Ignaz Ungar; at once the copy of the acte is to send for the purpose to take notice of it and for the purpose of control, with the decision of the magistrate, num. 32409 a. c. to the chief medical office of the capitale and to the administration of the first district, Budapest, 10th October, 1882.

The magistrate of the capitale Flamrsa M. P. co-nsellor, in the name of the vice-bourguemastre—num. 1721—1886. I do certify hereby that this copy *is* perfectly conform with the official copy without stamp presented by Mr. Ignaz Ungar proprietor of bitter-water sources at Buda Pest. Budapest on the 7th day of October, one thousand eight hundred and eighty-six. Authentication—.30, copy—.20—stamp .50=fl. 1—Dr. Matt Furth M. P. substitute
890 of the notary public royal Dr. Charles Weiser, confirmed by the acte num. 1886 of the notarial chamber of Buda Pest.

No. 1 sr. 1886. This translation *is* conform with the Hungarian text annexed.

Budapest 7th October, 1886.

[SEAL.]

EDWARD SOMOGYI,
Sworn Interpreter.

(*Two Acknowledgments in Hungarian Language.*)

United States consulate, Budapest.

I, Louis Gerster, vice-consul of the United States of America at Budapest, do hereby certify that the foregoing is the true and geu-

uine signature and seal of the royal Hungarian ministry of justice and as such is entitled to full faith and credit.

Given under my hand and seal of the consulate, this the 8th day of October, 1886.

LOUIS GERSTER,
U. S. Vice-Consul.

[SEAL.]

"G."

Consulate of the United States of America, Budapest.

BUDAPEST, *November 6th*, 1885.

At the request of Mr. Ignatz Ungar, a citizen of Budapest, Hungary, and the proprietor of the "Hunyadi Arpad" and the "Victoria" wells of Ofen, Hungary, I have this day inspected and examined certain legal documents submitted to me by the said Ignatz Ungar, and,

I do hereby certify that these documents contain quite satisfactory evidence as to the following facts, to wit—

That the said Ignatz Ungar obtained the privilege to introduce the trade-mark "Hunyadi Arpad" and "Victoria" and that he is justly entitled to the same, the said privilege having been granted to him by the minister of commerce of Hungary, on October 5th, 1880, and October 10th, 1882, on each day separately;

891 That on November 3d, 1880 the said Ignatz Ungar has entered (deposited) the bottle label "Hunyadi Arpad wells" with the chamber of trade and commerce of the named city of Budapesth;

That on November 9th, 1883, the district authorities — Budapesth and Ofen have granted to the said Ignatz Ungar a certain privilege of trade whereby he is permitted to introduce and to sell the waters of the said "Hunyadi Arpad" and "Victoria" wells anywhere and everywhere; further do I certify;

That the said Ignatz Ungar has declared verbally in my presence this day that he has entrusted the sale of the said waters in the United States of America to his son Josef Ungar who has lately emigrated there;

Further do I state that in addition to the named "Hunyadi Arpad" and "Victoria" wells there exist in Budapesth-Ofen four other Hunyadi wells, namely: "The Hunyadi Janos," the "Hunyadi Laszlo," the "Hunyadi Matyas," and the "Hunyadi Erzsebet."

In witness whereof I have hereunto set my hand and the seal of this consulate on the 6th day of November, 1885.

HENRY S.
U. S. Consul at Budapest.

[SEAL.]

"H."

Authentic Translation from the Hungarian.

The Budapest chamber of commerce and industry.

No. 2–1887. Certificate. (1 florin stamp.)

The undersigned chamber of commerce and industry, by these presents doth certify that the trade-mark hereto annexed on the other page hereof has been registered the 22nd day of February, 1886, into the register of trade-marks kept at this chamber under No. 1310, for and on behalf of Ignatius Ungar of Budapest, proprietor of a Budapest bitter-water spring, and further doth the
892 undersigned chamber certify that above registration never being made the subject of any attack it is valid and legally of upright standing.

Given at Budapest, 3rd day of January, 1886.

The Budapest chamber of commerce and industry (L. S.) sig. bo Kochmeister, president, sig. Steinacker, Odon, secretary.

(Annex: The "Hunyadi Arpad" label from the trade-mark of above said industrial concern.)

(Acknowledgement in Hungarian language.)

AUSTRO-HUNGARIAN MONARCHY, } ss:
Kingdom of Hungary, }

Metropolitan city of Budapest.

I, the undersigned royal notary public and the courts of justice, sworn English interpreter in and for Budapest do herewith certify, that having compared the English translation of herebefore with the Hungarian official certificate hereto annexed, I now declare it under faith of my interpreter's oath to be faithful and conform.

Whereof an act being required, I granted these presents under my interpreter's seal of office and put my hand thereto.

Given at Budapest aforesaid the 4th day of January, 1887.

DR. WEISER KAROLY,
CHARLES WEISER, ESQ.,
Not. Publ., English and French Sworn Interpreter. [SEAL.]

United States consulate at Budapest.

I, Henry Sterne, consul of the United States at Budapesth, do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Charles Weiser, notary public and sworn English and French interpreter of the city of Budapesth, Hungary.

Witness my hand and the seal of the consulate at Budapesth this the 4th day of January, 1887.

HENRY STERNE,
U. S. Consul. [SEAL.]

893 "I."

Authentic Translation from the Hungarian.

(Copy.)

The Hungarian ministry for affairs of agriculture trade and commerce. Dated Budapest 9th day of June 1873, No. 8317. To the town council of the royal and free city of Buda. In matters of application of Andrew Saxlehner *versus* Ignatius Markus because of the name "Hunyadi Matyas tgyogyforras" (anglice Hunyadi Matyas medical spring) given by the latter named to his bitter-water spring, which application has been addressed under the 14th of October last year No. 14473 to the minister of home affairs but transferred therefrom to my department in order to be judged in competent manner: now I do make communication to the metropolitan town council, that your decree dated August 16th last year No. 11948 pronouncing also, that defendant is forbidden to call his bitter-water well discovered in Buda Kelenfold on his estate entered under protocole No. 915 with the name "Hunyadi Matyas" and to bring it into common trade under the same name, has been found by me to alter so far as above quotation goes, considered, that according to law VIII ex 1872 it is not permitted to make dependent an industrial concern regularly notified from the use or from the prohibition of a title or name be it even a name proper,—further considered, that it cannot be allowed to consider the name "Hunyadi Janos" used by Andrew Saxlehner since several years as appellation of his bitter water, and the "Hunyadi Matyas" which for Ignatius Markus did apply—to be trade-marked, the less so as the legal protection assumed by sec. 7 of the treaty of customs and trade incorporated in the law XVI ex. 1867 for trade-marks and trade patterns relates only to such trade-marks and trade patterns which have been assured by the deposition with—that is to say the registration at the competent trade chamber while in the present case such thing
894 has not been done at least there is no trace thereof in the acts of application, moreover such cannot be the case as the names "Hunyadi Janos" and "Hunyadi Matyas" be per so sufficiently different to exist and be used both without any mutual prejudice. And lastly from the point of public health considered, and according to the concordant opinion of the metr. chymist and the metr. head physician the bitter water of Ignatius Markus be of like consistency and of the same ingredients than the other bitter waters of Kelenfold estate it is not possible that it has an opposite effect to Andrew Saxlehner's bitter water and it could be of obnoxious effect in such cases of sickness against which Saxlehner's bitter water can be employed with good results. And on ground of the aforesaid arguments setting simply aside all motors of the inhibition, which besides are only on founded presumptions, it was necessary to allow to Ignatius Markus the use of the name "Hunyadi Matyas" applied for on behalf of his aforesaid medical spring and to set aside Andrew

Saxlehner's own motivated protestation. Whereof the interested parties receive notification under returning of their supplements.

(L. S.) Sig. Zichy.

(1 florin stamp.) This is to certify, that present copy be quite conform to the original kept under the records of Budapest metropolitan city's record office Budapest 7th December, 1887. (L. S.) sig. Dr. Toldy Lapto, registrar Kingdom of Hungary.

METROPOLITAN CITY OF BUDAPEST.

Stamp 2584, 1887 tolm ezam.

This is to certify that present English translation of the Hungarian deed or decree hereto annexed in copy authentic be a faithful and correct one.

Witness my hand and seal of office. Given at Budapest 7th day of December A. D. 1887.

In fidem DR. CHARLES WEISER,

[SEAL.] *Not. Publ., English and French Sworn Interpreter.*

895 United States consulate at Budapest.

I, Henry Sterne, consul of the United States at Budapesth do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Charles Weiser, notary public and English and French sworn interpreter of the city of Budapesth, Hungary.

Witness my hand and the seal of the consulate at Budapest this 8th day of December, 1887.

HENRY STERNE,

[SEAL.] *U. S. Consul.*

No. 108, fee 2 dols.

"K."

Lehn & Fink, wholesale druggists, 128 William street; P. O. box 3114; cable address, "Rostium."

NEW YORK, *June 5th*, 1888.

Mr. Joseph Unger, city.

DEAR SIR: Pursuant to the conversation held with you a few days ago, I now repeat that the statement contained in my affidavit in the suit of Fred. de Bary & Co., against you, to the effect that the mineral water known as the Hunyadi Arpad had at first been introduced here under the name of Victoria water, was based on information received from Moss, De Bary & Co.

Yours respectfully, ALBERT PLANT.

It is also my opinion that if, as you state, you are permitted to sell your mineral water in Austria under the name of "Hunyadi Arpad," you will also be permitted to sell it under this name, provided neither your style of package nor your label resemble those of the Hunyadi Janos.

ALBERT PLANT.

896 Supreme Court, City and County of New York.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
JOSEPH UNGAR, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Erich Brunler, being duly sworn, deposes and says, as follows: I reside in the city of New York, and have so resided and have been familiar with the business of the sale of mineral waters in said city for the past two years; I am well acquainted with the mineral water known as "Hunyadi Janos" and also with the mineral water known as the "Hunyadi Arpad" water; I am also well acquainted with the mineral water known as the "Victoria bitter water," all of the three aforesaid mineral waters I know to be totally distinct from each other, and the distinction between them I know to be well recognized by all persons engaged in the mineral-water trade. I have traveled through Hungary and the Orient with several Hungarian bitter waters. It is not true that the "Hunyadi Janos" water is known and designated by the trade by the single name "Hunyadi," because there are a number of Hungarian mineral waters called by the names of which the word "Hunyadi" forms a part, and these different waters are commonly designated by the trade by their full names as "Hunyadi Janos," "Hunyadi Arpad," "Hunyadi Laszlo," &c.

I am well acquainted with the "Victoria" bitter water and
897 as far as I know the said "Victoria" bitter water has never been put upon the market either in this country or in Europe under any other than its own name, and from my information and my experience in mineral waters I firmly believe that the said "Victoria bitter water" is totally distinct from, and comes from a different spring from the mineral water known as the "Hunyadi Arpad."

ERICH BRUNLER.

Sworn to before me this 19th day of June, 1888.

H. B. BLAUVELT,
[SEAL.] *Notary Public, City and County of N. Y.*

898 Supreme Court, City and County of New York.

THE APOLLINARIS COMPANY, LIMITED, Plaintiff,
against
JOSEPH UNGAR, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Julius Sornborn, being duly sworn, deposes and says, as follows: I reside in the city of New York and have so resided and have been familiar with the business of the sale of mineral waters in said city for the past twenty-four years; I am well acquainted with the mineral water known as the "Hunyadi Janos water," and I am

acquainted with the mineral water known as the "Hunyadi Arpad water;" I am also well acquainted with the mineral water known as the "Victoria bitter water," all of the three aforesaid mineral waters I know to be totally distinct from each other, and the distinction between them I know to be well recognized by all persons engaged in the mineral-water trade.

I am acquainted with the "Victoria bitter water" and I am informed and verily believe that the said "Victoria bitter water" has never been put upon the market either in this country or in Europe under any other than its own name, and from my information I firmly believe that the said "Victoria bitter water" is totally
899 distinct from, and comes from a different spring from the mineral water known as the "Hunyadi Arpad."

JULIUS SORNBORN.

Sworn to before me this 19th day of June, 1888.

ALFRED BERCHER,
Notary Public 98, *New York City.*

STATE OF NEW YORK, }
County of New York, } *ss.:*

I, William Sohmer, clerk of the said county and clerk of the supreme court for said county, do certify that I have compared the preceding with the original record, The Apollinaris Company, Limited, *vs.* Joseph Ungar, filed July 9th, 1888, on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 3d day of March, 1898.

[SEAL.] WM. SOHMER, *Clerk.*

900 DEFENDANT'S EXHIBIT PRINCE AFFIDAVIT.

Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER
vs.
HARRY C. GRAEF and FRANZ DRAZ. } In Equity.

Julius Charles Prince, being duly sworn, deposes and says: I am of mature age; I reside at 22 Upper Wimpole street, in the county of London, England.

The Apollinaris Company, Limited, is a corporation duly incorporated according to the laws of England. Their registered address is 4 Statford place, London, aforesaid. The Apollinaris Company is hereinafter, for brevity's sake, referred to as the company.

I was formerly for some years secretary to, and have been since the year 1888, and am now, a director of the company.

I am acquainted with the Hunyadi Janos bitter water which comes from an estate and establishment called "Hunyadi Janos," now the property of Mrs. Saxlehner. This name was given to certain

lands and springs thereon at or about the time of the discovery of the springs.

The spring was so named after John Hunyadi, a celebrated Hungarian hero. The surname Hunyadi, is a common one in Hungary and means of or from Hunyad. There are several persons of this name in Budapest. Two of such persons bear the Christian name Janos (John). There is a street in Budapest named Hunyadi
901 street, and a square there named Hunyadi square. Hunyadi is also the name of a district in Hungary, and there is a hill named Hunyadi hill (so named in the year 1847) in the neighborhood of Budapest and of the said springs. There are towns in Hungary named Banffy Hunyad and Vayda Hunyad.

Further land has from time to time been acquired by Mrs. Saxlehner and her predecessor Andreas Saxlehner, and additional springs dug thereon. The water is, and has for many years been drawn from several springs or rather wells or shafts. Andreas Saxlehner issued a pamphlet in the year 1878, which mentions 21 springs as being in use. In a pamphlet issued by Mrs. Saxlehner in 1894 it is stated that there are 100 springs.

In the year 1873 Andreas Saxlehner petitioned the council of the city of Budapest for leave to change the name of his spring and to call it Victoria late Hunyadi Janos. Thereupon permission was granted him to name his Hunyadi Janos Kelemfold bitter-water spring "Victoria late Hunyadi Janos bitter-water spring." Subsequently Alexander Saxlehner obtained a license to retain the designation "Hunyadi Janos" for his bitter-water spring situate in Kelenfold.

As long as 1878, owing to the number of Hunyadi waters in the market, Andreas Saxlehner endeavored and has ever since continued to endeavor to get the name of "Saxlehner's bitter water" attached to and used by the public in ordering Hunyadi Janos water. With that view he has frequently and continually used advertisements to the following effect:

"In order to avoid misrepresentations all friends and consumers of genuine Hunyadi Janos are requested expressly to demand Saxlehner's bitter water."

A specimen of such advertisement is now produced by me and marked P, 1.

902 Another form of advertisement was as follows:

"Whoever wishes to obtain the real Hunyadi Janos water are expressly to ask in shops for "Hunyadi Janos bitter water" or short Saxlehner's bitter water. There exists similar bitter water, the label of which, both as to print and colour, can hardly be distinguished from the Hunyadi Janos label. Even the name Hunyadi with some other name has been used so as to take the public unawares, and it is consequently necessary to take care that the true label bears the signature Saxlehner."

A reprint of such advertisement is now produced to me and marked "P, 2." The original was enclosed in a letter written by Andreas Saxlehner to the company, dated 27th December, 1878, in which he stated:

"Whenever the Mattoni or Hunyadi Lazlo springs raised their head under the auspices of a dealer, I at once published the enclosed advertisement which never yet failed in its object."

The Mattoni springs then referred to are those from which come the water bearing the name "Hunyadi Matyas." The words "Saxlehner bitter water" have for years been printed on the labels used by Saxlehner.

In the year 1876 the Hunyadi Janos water was comparatively unknown in the United Kingdom, and the sale thereof in the United Kingdom was trivial. It was quite unknown in the United States of America. In 1876 the company entered into a contract with Andreas Saxlehner for the sole sale of the Hunyadi Janos water in all parts of the world except the continent of Europe and Smyrna. A true translation of such contract which is in the German language is now produced to be marked "P, 3."

903 The company were induced by the said Andreas Saxlehner to enter into the contract in the belief that he, Andreas Saxlehner, alone had the right to use the word "Hunyadi," and upon the faith of statements made by Saxlehner as to the value of his water, which was supported by reports and analysis, which he furnished to the company, and which purported to prove that the water was much more valuable than that which was analyzed by Professor Liebig in 1876, which analysis was inserted in the contract as tha normal analysis. In particular one analysis by Professor Bunsen gave sulphate of soda 225 parts in 10,000 and sulphate of magnesia 223 parts in 10,000.

The company were not aware when they entered into the contract in 1876 that there were (as is the fact) other Hunyadi waters in the market. This, which was well known to Andreas Saxlehner, was concealed by him from the company.

A further contract was entered into in the year 1878 by which Andreas Saxlehner bound himself to supply the company with water taken only from those springs, which for the time were richest in salt contents. Notwithstanding this contract Saxlehner continually did not supply the company with water from his richest springs, but persisted, notwithstanding numerous complaints, in furnishing the mixture referred to in paragraph 6 hereof, so much so that the company insisted upon Saxlehner removing from the labels supplied to the company Bunsen's analysis, as they felt they were not justified any longer in selling the water with such an analysis thereon.

In 1888 the company brought an action against Saxlehner in the Buda Pest court for damages in consequence of this violation of the said further contract. The court decided that Saxlehner had broken his contract in this respect, but refused to award damages. From that time forward the company did not get as strong water as they were entitled to, under the said contract, though they did, as a

904 matter of fact, get a somewhat stronger water than was supplied on the continent. Eventually, for this and other reasons, the company were obliged to give notice to terminate

their contracts with Saxlehner, and they came to an end in March 1896.

It is not true that any Hunyadi Janos water was exported by Saxlehner through the company to the United States. The company never were his agents, but only purchased the water from him out and out.

Since 1876, owing to the exertions of the company, and at the cost of the company (upwards of £39,000 having been voluntarily expended by the company in advertising), the water has become widely known, especially in the said United States. It is true, as stated by Kalman Saxlehner, that the Hunyadi Janos water has been advertised in all parts of the world at enormous expense, but such expense has been incurred, except as to the continent of Europe, by the company, and not by Saxlehner as would be inferred from the said statement. Until last year Saxlehner did not advertise the Hunyadi Janos water in the United States.

The United States indeed was one of the company's most lucrative markets, and it was important to the company to protect themselves there, and they had to guard themselves against competition not only by other people, but also by Andreas Saxlehner himself and those who now represent him in business.

As regards competition by other persons, there were numerous Hunyadi waters in the market, and the company felt that the name of Hunyadi Janos by itself was no longer a sufficient protection either to the public or to the company against other waters being passed off as the water hitherto sold as Hunjadi Janos, a conclusion to which Saxlehner has also come as far back as 1878, as appears from paragraph 6 of this my affidavit.

As regards competition by Andreas Saxlehner, the contract between Saxlehner and the company defined for the pur-
905 poses thereof Hunyadi Janos as that water which Andreas Saxlehner draws from his springs situate in the neighborhood of Ofen. Notwithstanding the provisions of the contract, Andreas Saxlehner began in 1886 to offer for sale and sell in the districts reserved to the company by the contract, water bottled in bottles and with capsules both of the same shape as is used for Hunyadi Janos and other Hungarian aperient waters, coming from some of his land in the neighborhood of Ofen as "Saxlehner's Arpad," and to do so at a lower price than he was bound to sell it at by his contract with the company.

In consequence of this breach of contract the company took proceedings against Andreas Saxlehner in the exchange court of arbitration at Vienna, and such court decided in February, 1887, that he was not entitled to sell "Saxlehner's Arpad" water in the company's districts. Notwithstanding such decision, "Saxlehner's Arpad" was offered for sale in the company's districts since the decision, and as I verily believe by or with the concurrence of Saxlehner in his lifetime and of his successors in business after his death.

Prior to the contract being entered into between the company and Andreas Saxlehner, but whilst negotiations were going on, the com-

pany were offered by Messrs. Koechlin & Holz of Budapest the sale of Arpad water with a supply of 2,500,000 bottles and upwards per annum and of a quality at least quite as good as the quality which Andreas Saxlehner offered. The company communicated this offer to Andreas Saxlehner on the 15th November, 1875. He replied on the 20th November, 1875, that this (Arpad) spring could not supply anything like the 2½ million bottles per annum, and that the offer was based on ignorance, for he doubted very much if they had ever since they began sold 50,000 bottles, and that their territory and experience was very small, and he succeeded in dissuading the company from having anything to do with the offer, and the company entered into the contract
906 with Andreas Saxlehner. Very soon thereafter, however, in 1878, Andreas Saxlehner bought up the said Arpad spring and used it to compete with the company as mentioned in paragraph 19 affixing to its water a label in which the water was described as "Saxlehner's natural aperient water," the very words he recommended by his advertisements the public to use if they wished to be sure of obtaining his Hunyadi Janos water. Such competition was intended to be of a most serious character. For this purpose 55,000 bottles as a beginning were shipped to New York. This having been discovered by the company they took proceedings in New York with the result that by order of the court there the 55,000 bottles of Arpad were destroyed and were thrown into the Hudson river.

The company further discovered that Saxlehner's Hamburg agent was exporting Arpad water to South America and other parts of the company's district. The company thereupon also took proceedings in the Hamburg courts, and such agent was condemned to pay the company damages in respect of 13,000 bottles.

Andreas Saxlehner in his lifetime also adopted "Hunyadi Erszebet," "Hunyadi Corvin," "Kossuth Lajos" and "Janos" as titles for water drawn from his lands in the neighborhood of Ofen with the intention (as I then believed and still believe) of selling or inducing others to sell in the company's district water under the titles of "Hunyadi Erszebet," "Hunyadi Corvin," "Kossuth Lajos" and "Janos," or some of them, and in the year 1893 Saxlehner bought up the springs "Hunyadi Arpad" and "Hunyadi Bela."

The said contract further provided that Saxlehner was bound to refuse all orders which he knew or had good reason to suppose were intended for places reserved to the company by the said contract, and to refer the same to the company. Notwithstanding this provision, Saxlehner frequently and continually executed orders
907 for Hunyadi Janos water which he knew, or had good reason to suppose, were intended for places reserved to the company by the said contract, and he executed such orders to persons notwithstanding the company having warned him of the intention of such persons to invade the company's district.

In the year 1885 the company discovered that large quantities of Hunyadi Janos water were being exported from Hamburg to New York. In October, 1885, they discovered upwards of 66,000 bottles

at Hull, in England, which had come from Hamburg and were in course of transhipment for New York. The company brought an action in England and obtained an injunction detaining these bottles in Hull, and the result such bottles were surrendered to the company. A further quantity of bottles having arrived at New York, they formed the subject of legal proceedings before the United States circuit court. That court decided in March, 1886, that the company had no right to prevent genuine Hunyadi Janos water being imported by others into America, and that their remedy was to take proceedings against Saxlehner for breach of his contract with the company if they could show that he was acting in collusion with the American importers.

In 1886 the company also found a water called "Hunyadi Arpad" and the before-mentioned "Hunyadi Matyas" being imported into the United States of America. The company thereupon commenced actions to restrain the sale of such waters, and obtained preliminary injunctions. The evidence filed on behalf of the defendants to these suits as to their right to use the word "Hunyadi" made it appear very doubtful whether at the trial the company would be successful. Furthermore the company had experienced a want of good faith on the part of Saxlehner in so far that he had connived (as the company believed) at the export by others of "Hunyadi Janos" to America and that he tried to sell Saxlehner's aperient waters to the company's district under other names as, for instance the name of "Arpad."

908 Thereupon the company came to the conclusion that they required to make use of a trade-mark of their own to protect their interests. Accordingly the company commenced to use a trade-mark of their own, a red diamond, on Hunyadi Janos and various other natural mineral waters which they sold and such mark has been used continuously ever since the year 1887.

It is common practice for traders in the United States of America as also in this country to put their own trade-marks of selection upon the goods of other people which they deal in. The company's red diamond mark is nothing more than a mark of selection. It was adopted by the company as such, and it has not by its adoption by the company become specially associated with Hunyadi Janos water. It being a mark of selection it has been put upon the following 27 different waters sold by the company:

Vichy,	Royal,	Orezza,
Carlsbad,	Bonnes,	Woodhall Spa,
Vals,	Homburg,	Wiesbaden,
Contrexeville,	Kreuznach,	Salvator,
Ems,	Kissengen,	Bussang,
Missis quoi,	Evian,	Marienbad,
Bethesda,	Schwalbach,	Challes,
Kronenquelle,	Wildungen,	Chatel Guion,
Bourboule,	Tarasp,	St. Marco.

In fact all except Apollinaris water and Friedrichshall water as to both of which the company having special contracts on the sub-

ject use special marks. The diamond mark is, in fact, meant only to indicate that mineral waters so marked are sold by the company.

Over 385,000 bottles of such other waters bearing the diamond mark have been sold by the company and there was and is nothing to prevent such waters being exported to the United States.

It is within my own knowledge there has been since 1886 no difficulty whatever in selling in the said United States Hun-
909 yadi Janos water without the red diamond, I instance the importation referred to in paragraph 25 hereof which were imported with the concurrence of Saxlehner (as I believe) and were disposed of without difficulty. The quantity so imported and sold was very large. The company was able to trace large quantities and I have no doubt there was a great deal that the company did not become aware of.

In England the company were thus deprived of nearly one-third of their English trade by such importations winked at by Andreas Saxlehner.

In England the size of bottle of Hunyadi Janos water which was principally sold was the quart bottle. On the other hand in France this quart bottle was not and is not at all sold, and in Germany it was sold but to a very small extent. A chemist named Snook succeeded nevertheless in importing into England large quantities of Hunyadi Janos water in quart bottles from the continent and even from France. The company repeatedly called the attention of Mrs. Saxlehner to this fact, and urged her to use vigilance in declining to supply continental customers with this size bottles which they were not in the habit of using. She declined to comply with this request alleging as her reason for this refusal that such steps might disarrange her continental trade. It has been ascertained that Snook purchased a large quantity of such quart bottles from one Gatzert of Marseilles who had never before bought this size from Saxlehner. Saxlehner nevertheless executed Gatzert's orders for this size although the company had specially cautioned her against so doing and although she knew that the consumption in France was only of small bottles of which she sold large quantities to Gatzert. In March, 1896, the contract between the company and Saxlehner was determined by the company, and just before the termination Mrs. Saxlehner issued a circular to her continental buyers intimating to them that thenceforth she would not
910 supply them with quart bottles, but only with small bottles. This shows that she could have controlled the trade and fulfilled her obligations to the company had she been so minded, at all events so far as the quart bottles are concerned, which in England, as before stated, are almost exclusively used. A copy of such circular with translation annexed is now produced to me and marked P, 4.

Saxlehner is now freely advertising in the United States of America that the Hunyadi Janos water when sent out from the springs did not bear and never had bore a "diamond mark," and that the only guarantee of genuineness of any bottle was the signature upon the label of the proprietor, Andreas Saxlehner.

In September, 1888, upwards of a year after the adoption (in 1887) of the diamond mark, the company decided to cease to advertise the word "Hunyadi" and they thereupon described the Hunyadi Janos water as "Hungarian aperient water." Their reasons for so doing were as follows:

In or about January, 1888, applications were made to the said United States circuit court by the defendants in the Hunyadi Arpad and Hunyadi Matyas suits to dissolve the preliminary injunctions mentioned in paragraph 26 hereof, but such applications were refused on the ground of delay.

The company informed Andreas Saxlehner of the proceedings before the United States circuit court and warned him of the difficulties in maintaining the exclusive right to the words Hunyadi Janos, asked him to assist them, and informed him that if he would not that the company would have to protect themselves and rely on their own reputation. I refer more particularly to letters written by the company to Saxlehner on the 24th January, 1888, and 26 June, 1888.

In the first of these letters after referring to the Hunyadi Matyas and Hunyadi Arpad suits brought by the company in the United States, and pointing out that such proceedings were hampered by Saxlehner having moved in England to expunge certain of the company's registered trade-marks relating to Hunyadi Janos, they asked if he was willing to support the company in defending the right to the exclusive use of the words Hunyadi Janos, and continued as follows:

911

"We request you to inform us if you are prepared to go hand in hand with us for the defense of our mutual interests and if you are willing to pay in whole or in part the expense thereof.

"If by the end of this month we are without a definite reply hereto, we shall infer that you decline to join us and to bear any such expense.

"We must then ask ourselves (supposing we decide not to act alone in prosecuting still further the defense of these marks in America) if we are prepared to see other Hunyadi waters established upon the American markets and Hunyadi Janos no longer an exclusive trade-mark. This state of things would practically mean a complete change. Advertisements as hitherto used by us would not benefit the Hunyadi Janos alone, but would be in favor of all the so-called Hunyadi waters of which there now exist a number near Ofen. Hence the question necessarily arises what can be done to secure an adequate return for the cost of our advertisements. We incline to the belief that in this event we have no option but to rely upon our own name and reputation for the maintenance of our position in the sale of bitter waters and eventually we shall have to use other means to secure the object effectually."

Andreas Saxlehner did not comply with the request of the company contained in this letter, and in June, 1888, the second of the said letters was written which was as follows:

912

"We think it only courteous in spite of your refusal to assist in the proceedings in our action against the agent of Ignatz Ungar in New York (this had reference to the Hun-

yadi Arpad water) to inform you that on Saturday last we for the first time heard by telegram from New York that a motion would be made on the 2d day of July next by the said agent to dissolve the injunction granted in 1886, restraining him from using Ungar's Hunyadi Arpad label. The recently published decision of the Hungarian minister of commerce given against you in your case *v.* Hunyadi Joseph confirms us in the opinion which we had formed more than a year ago and mentioned to you in our letter of the 8th March, 1887, that we cannot hope to succeed in preventing the sale of other waters in America under names of which the word Hunyadi forms part. We do not therefore intend to oppose the dissolution of the injunction."

The motion to dissolve the injunction referred to in the last-stated letter was made, and the injunction was dissolved in July, 1888, and Hunyadi Arpad was freely sold in the United States until the spring was bought up by Saxlehner as before mentioned. The injunction in respect of "Hunyadi Matyas" was also dissolved in July, 1888 (but subsequent to the date of the dissolution of the other injunction), and Hunyadi Matyas is now and has been for many years freely sold in the United States.

Advertisements issued in America of Hunyadi Arpad and Hunyadi Matyas are now produced to me and marked respectively P, 5 and P, 6.

The position (July, 1888) was as follows: The company had failed to secure the co-operation of Saxlehner, as hereinbefore mentioned, and found a number of Hunyadis being sold in the United States of America, which were formidable competitors to the company. Consequently, with a view to protect themselves, the company decided about September, 1888, to drop in advertisements the
913 words "Hunyadi Janos," considering there was no advantage in advertising the other Hunyadis, and then adopted the said term "Hungarian aperient water" in their advertisements and invoices. The labels, the capsules, and the bottles, of course, continued to describe the water as "Hunyadi Janos," as hitherto, the words occurring 14 times on the labels alone.

Shortly afterwards, in the year 1889, the company commenced to invoice and describe the Hunyadi Janos water as "Hunyadi aperient water, diamond mark," and continued to do so until about April, 1891, when the company ceased to advertise or use the phrase. The forms of invoice subsequently used are now produced to me and marked P, 7.

Although the water was invoiced for a short time as "Hunyadi aperient water, diamond mark," the labels, capsules, and bottles, of course, continued always to bear the names of Hunyadi Janos in the most prominent manner.

The public do not infer, and have not been led to infer that the diamond mark means the genuine Hunyadi Janos water from Saxlehner springs. It is clearly stated on the mark that it is only meant to indicate that mineral waters so marked are sold by the company.

Since the termination of the said contract between the company

and Saxlehner, the company has been selling an Hungarian aperient water named "Apenta," which is purchased from the owners of the spring in Hungary.

For such "Apenta" a label has been especially designed with a view of being made as different as possible from the Hunyadi Janos label. The Hunyadi Janos label is divided into three parts, consisting of a central red panel with two wings printed upon a white ground for use in England, and upon a blue ground for use in America. The Apenta label has neither the panel nor the wings (which are a great characteristic of Hungarian aperient water labels, as
914 appears from the labels now produced to me and marked P, 8), and it is used in light blue for England and in brown for the United States of America. Consequently, in appearance it is totally different from the Hunyadi Janos label, both in its broadest characteristics and in its details. Bottles of Hunyadi Janos water have the words "Hunyadi Janos" blown into the bottles, whilst the bottles of Apenta water are quite plain. Again, there is Saxlehner's signature on every bottle of Hunyadi Janos water, to which she draws attention in her advertisements. Again, each bottle of Hunyadi Janos is wrapped up in a printed sheet of pink paper, which is not the case with Apenta. A bundle of labels as used for Apenta water in various parts of the world (where the company are largely dealing in the water) is now produced to me and marked "P, 9." The Hunyadi Janos wrapper is also produced and marked "P, 10."

The company have taken every precaution to prevent the Apenta water being passed off as Hunyadi Janos. From circulars sent to the trade and advertisements in various papers, the difference between the two waters has been made clearly known.

On the invoices used by the company's agents in the United States, it is stated that the Apenta water is superior (as is a fact) to the Hunyadi Janos water. A copy is now produced to me and marked "P, 11."

In my judgment, it is quite impossible for the trade to believe the two waters came from the same springs, or are in any way identical.

As regards the public, the two labels are so utterly dissimilar that the one could not be mistaken for the other.

There is still upon the market a quantity of Hunyadi Janos water bearing the diamond mark, and the name of the company as the importers. If the public see the two bottles side by side a single glance will show that as between these two waters
915 there is no possibility of mistaking the Hunyadi Janos with its blue label with the light-brown label used in the United States for Apenta water, the distinguishing marks of which are the word "Apenta" and the red-egg mark.

The company place upon the said Apenta water their said trademark of the red diamond, but the same is not used in the same manner as it had theretofore been used on the bottles of Hunyadi Janos. It was placed in an entirely different part of the bottle, as from a

comparison of a bottle of Hunyadi Janos and Apenta will readily appear.

As regards the allegation that Saxlehner adopted a characteristic and novel style of bottle when he adopted the name of Hunyadi Janos for his water, I say that such allegation is not true. It appears from the affidavit of Kalman Saxlehner that when his father named his spring Hunyadi Janos other springs were then known under the names: Deak Ferencz, Gr. Szechery, Erzebet and Hildyardi.

It is a fact and is indeed common knowledge in the trade that these waters were in bottles similar in shape to the bottles then used for Hunyadi Janos. The circumference of these bottles at the shoulder was greater than at the foot thereof. In consequence of the numerous breakages owing to this shape of bottle, the same was, upon the representation of the company, abandoned and the present shape adopted. Such shape was before and after the slight change above described and is common to the trade and has been used to my knowledge for 20 years for the numerous bitter waters which are bottled at Budapest, such as Franz Josef, Aesculap, Mattoni's Royal Hungarian, and many others. It is not true, as stated by the said Kalman Saxlehner, that since 1877 the bottles of Hunyadi water have been of the same shape.

Throughout the whole course of our business with Saxlehner, extending over 20 years, he has never asserted or claimed any exclusive right to the shape of bottle or capsule employed by him for Hungarian aperient water.

916 As regards the word Hunyadi on the labels for Apenta water, the company used this because—

1. "Hunyadi" has become a generic term for Hungarian bitter waters.

2. Apenta water is Hungarian bitter water.

3. The company were anxious to have it known that their water is one of the many Hunyadis in the market, because by that name the buyer becomes at once aware that he buys Hungarian aperient water. This was a matter of greatest importance as regards the United States of America (the company's most lucrative market), France and indeed the whole continent of Europe, where a number of Hunyadis have been freely sold and in all of which places the company is trading.

The said water has been openly and publicly sold in the United States of America since the 26th March, 1896, under the trade-mark "Apenta." Prior to the introduction of the water into the said United States of America by the company, the company issued circulars stating their intention to introduce an aperient water drawn from the Uj Hunyadi springs as soon as their contract with Saxlehner had expired. This circular was very widely advertised and circulated, and from my knowledge of Saxlehner's arrangements for watching the trade I am satisfied that it came to the knowledge of Saxlehner towards the end of November or beginning of December, 1895.

As regards the various Hunyadi waters in the markets the fol-

lowing is a list of some of them. They are all (like Hunyadi Janos) natural products obtained in the same sample way, namely, by persons owning land in which these waters collect simply digging holes or wells therein. They are all bottled in the neighborhood of Budapest. In the first column I have set out the name of the water, and in the second column some information as to the sale thereof.

917	Column 1.	Column 2.
a.	Hunyadi Corvin	Belongs to Saxlehner. There has been a small sale in the United States.
B.	Hunyadi Erzebet	This spring was so named by Pollock & Son of Budapest. Saxlehner bought up the spring and a license to sell the water was transferred to him.
c.	Hunyadi Arpad.....	Sold largely since 1880 in Budapest, Germany, the United States of America, Australia, Brazil, Chili, Gautemala and Panama. The imports into the United States alone between 1888 and 1893 were over a million bottles. In 1893 Saxlehner purchased this spring. The name is registered in Germany as a trade-mark by a firm other than Saxlehner.
d.	Hunyadi Bela.....	This spring was also bought up by Saxlehner in 1893. This water had a sale in Budapest and especially in the United States of America.
e.	Hunyadi Laszlo.....	Sold in England to small extent and as far back as 1884. On the continent to a large extent continuously since 1878, especially in France, Austria and Hungary. Also in United States of America.
918		
f.	Hunyadi Matyas.....	Sold for many years in Hungary. Ever since about the year 1873. Since 1890 over a million bottles have been imported into the United States of America.
g.	Hunyadi Lajos.....	Sold in Hungary for many years. In Italy. In the United States of America since 1892, where over a half a million bottles have been imported.
h.	Hunyadi Josef	Sold in Hungary and to a slight extent in the United States of America.
i.	Hunyadi Miklos.....	Sold to a small extent in the said States.
k.	Hunyadi Aesculap....	Sold to a small extent in the United States of America.

Waters named Corvin, Janos, and Loser Janos (not belonging to Saxlehner) have also a small sale in the United States. It has been alleged on behalf of Saxlehner that he is the proprietor of a natural

mineral-water spring at Budapest known as "Janos" spring, and that he has the exclusive license from the proper Hungarian authorities to bottle and sell mineral water under the name Janos.

From the foregoing it will be seen that there are a large number of Hungarian aperient waters having the words Hunyadi as part of their title. Of these Saxlehner has registered trade-marks in Budapest for the following:

Hunyadi Janos.
Hunyadi Corvin.
Hunyadi Erzsebet.
Hunyadi Arpad.
Hunyadi Bela.

The list now produced to me and marked P, 12 is a true statement of such numbers compiled from official documents published in the said States.

919 Saxlehner is fully aware that he has no monopoly in the United States of America of the word Hunyadi, but only of that word used in conjunction with the word "Janos." So well does he know this that in said United States of America he advertised to the following effect:

"Observe that the words Hunyadi Janos are inseparable and must go together (Bonfort, 10 July, 1896); when prescribing, kindly write the full name, 'Hunyadi Janos.'"

(Medical Record, 5 Sept., 1896.)

The two last-mentioned advertisements are now produced to me and marked P, 13 and P, 14.

The following communication was made by or on behalf of Saxlehner to the Pharmaceutical Era of New York on the 9th April, 1896 (see pages 474 and 475, Pharmaceutical Era), now produced to me and marked P, 15.

"The celebrated Hungarian aperient water 'Hunyadi Janos' has been on this market for more than 25 years, and the name Hunyadi has almost become a household word. There are other Hunyadi waters, though, and the proprietors request dealers to use caution in ordering, and to specify 'Hunyadi Janos,' not calling merely for Hunyadi."

Owing to a recent change in the law of Hungary, Saxlehner, in the year 1896, succeeded in obtaining orders expunging trade-marks which had been duly registered there for the various Hunyadi waters in the market there, including a label for Uj Hunyadi water. Before such new law came into force Saxlehner had on many occasions attempted by legal proceedings to stop the sale of the other Hunyadi waters at Budapest, and failed.

As an illustration, I may mention Saxlehner brought suit in Hungary as far back as 1873 to stop the sale of Hunyadi Matyas water, which failed. Similarly in 1878 he brought suit to stop the sale of the Hunyadi Laszlo water, and also failed.

920 Saxlehner was thus aware for many years of the existence of the other Hunyadis and since 1886 he was aware of their large and increasing sale in the United States. The company has

called his special attention to this and invited his assistance to aid in stopping them, which he refused to give.

At the same time he refused or neglected to take any steps himself in the United States of America against such other Hunyadis during the existence of our contract, although he did take proceedings in England. For instance, while the said contract was in existence he repeatedly took legal proceedings in this country for the protection of his Hunyadi Janos label.

It is not true as stated in the bill of complaint that 150,000 bottles were seized at Budapest bearing a label containing the words Uj Hunyadi. Saxlehner caused a magisterial inspection of the Uj Hunyadi springs to be made when it was found that no bottles bore such a label and that such bottles which bore a capsule containing the words Uj Hunyadi or a cork bearing such words were in course of being respectively recapsuled and recorked with capsules and corks not bearing such words. Such work which had been put in hand immediately after the trade-mark decision referred to in paragraph 64 hereof was allowed to be completed and would in due course have been completed without the interference of the magistrate.

With reference to the suit commenced against the company in England by Saxlehner in June, 1896, the statements in the bill of complaint and in the affidavit of the said Kalman Saxlehner are garbled and inaccurate.

It is not true that the court enjoined the company from selling any bitter water under the name Uj Hunyadi, nor in fact did Saxlehner claim such an injunction.

The injunction claimed was in effect to restrain the sale of Hungarian bitter water under the name of which the word
921 Hunyadi formed part without clearly distinguishing the same from Saxlehner's water, and also to restrain the use by the company of their diamond mark.

The action was heard by the court in the month of February, 1897, and judgment given in March, 1897. On the 22nd January, 1897, the company wrote to Saxlehner informing her in effect that as from that date the company did not intend to use the word Hunyadi on the Apenta labels and capsules in England and offered to give an undertaking to this effect.

At the hearing of the action the company in no way receded from the offer contained in their said letter and so far as they were concerned the practical points in dispute were the right to use their diamond mark and the charges of fraud.

The court granted an injunction restraining in effect the company from selling any Hungarian bitter water not being Hunyadi Janos water derived from Saxlehner's spring with any name of which the name Hunyadi formed a part "without clearly distinguishing the same from the water derived from the said spring.

The court further held that the claim for an injunction respecting the diamond mark had broken down and that the charges of fraud which she had made against the company had also failed and directed Saxlehner to pay the company's costs respecting the claim

to the diamond mark and the charges of fraud. Such costs will I believe amount to several hundred pounds sterling.

The charges of fraud made by Saxlehner against the company in the said action included the charge repeated by the said Kalman Saxlehner in his affidavit as to the conduct of the company, and the court having heard the evidence *viva voce* of Saxlehner's witnesses and evidence for the company, held that such charges were unfounded. I do not, therefore, go into these matters in greater detail. It was further proven in the course of such proceed-
922 ings that it was true that the Uj Hunyadi springs were placed under the control of the Chemical Institute and that the arrangement was cancelled owing to the intrigues of Saxlehner and not because it was improper.

In court Saxleher's counsel admitted the statement on the company's label as to control was accurate.

As regards the words Uj Hunyadi on the Apenta labels, the learned judge in giving judgment stated that the Apenta label was of a color entirely different from that adopted for the Hunyadi Janos and that no man, even an unwary purchaser, seeing the two labels side by side could suppose that the bottles to which they were attached were samples of the same thing—that it was his decided opinion that the Apenta could not be passed off as Hunyadi Janos without fraud or gross ignorance on the part of the retail dealer.

As regards the diamond mark the learned judge said that it was proved to his satisfaction that the company used the diamond mark only as their trade-mark, that is a mark to indicate the goods, to which it was attached, was sold by them and if once it became their legitimate trade-mark in this sense he saw no reason why the company should not continue it on Apenta, or why it should be calculated to deceive. He added that the argument to the contrary rested on the evidence that the other waters to which the diamond mark was attached had a comparatively small sale, and he was invited to conclude that it was attached to such other waters merely as a blind to give a plausible pretext to attaching it to Hunyadi with a view of attaching it to some other water which might take the place of Hunyadi after the determination of the contract, and he held that the evidence from which such a conclusion might be reasonably made failed to satisfy him.

The document now produced to me and marked "P, 16," is an official certificate of registration of the company's red
923 diamond trade-mark in Hungary. Such mark is still on the register, and no application for its removal has been ever made by Saxlehner, or by any one else.

JULIUS C. PRINCE.

Sworn at the consulate general of the United States of America, at London, England, this 19th day of May, 1897, before me—

WM. M. OSBORNE,

[SEAL.] *Consul General of the United States of America at London, England.*

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States in and for the second circuit and southern district of New York,

Do hereby certify that I have compared the preceding with the original affidavit of Julius Charles Prince in the suit between Emilie Saxlehner, complainant, and Harry C. Graef and Frank Draz, defendants, on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New York in the district and circuit above named, this 14th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

(Signed) JOHN A. SHIELDS, *Clerk.*

924 DEFENDANT'S EXHIBIT APOLLINARIS HUNYADI ADVERTISEMENT.

The best natural aperient.

The Apollinaris Company, Limited, London, beg to announce that as numerous aperient waters are offered to the public under names of which the word "Hunyadi" forms part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond.

This label will henceforth also serve to distinguish the Hungarian aperient water sold by the company from all other aperient waters.

Demand the diamond mark.

And insist upon receiving the Hungarian aperient water of the Apollinaris Company, Limited, London.

Please mention the Medical Record. (The Medical Record, April 6th, 1889.)

DEFENDANT'S EXHIBIT APOLLINARIS 1893 TRADE NOTICE.

"Hunyadi" waters.

Paragraphs have recently appeared in some newspapers here stating that a New York firm of mineral-water dealers are the lessees in America of the Hunyadi waters of Buda Pest, and respectively sole agents in the United States for the famous Hunyadi springs of Hungary.

These statements are absolutely false, and the intention with which they are made is obvious.

925 Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London,

widely and successfully introduced the Hunyadi Janos water, the proprietor in Buda Pest of the springs having entrusted to them, for a term of years still unexpired, the sole sale of this water in England and in all transmarine places. Hunyadi Janos waters having become very popular, quite a number of other waters are now offered for sale, under names, of which the word Hunyadi forms part, and in bottles, and with labels, closely resembling in appearance and color those long used for Hunyadi Janos water.

The word "Hunyadi" having become a general name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Company affixed to the bottles of Hunyadi Janos the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited.

Consumers who desire to secure the Hungarian bitter water sold by the Apollinaris Company, are requested to see that the bottle bears the red diamond and they are cautioned against such absolutely false statements as those contradicted herein.

CHARLES GRAEF & CO.,
32 Beaver Street, New York,
Sole Agents in the United States and Canada of the Apollinaris Company, Limited, London.

926 DEFENDANT'S EXHIBIT HUNYADI MATYAS UNITED STATES TRADE-MARK.

The United States of America to all to whom these presents shall come:

This is to certify that by the records of the United States Patent Office it appears that the Eisner & Mendelson Company, of New York, New York, a corporation organized under the laws of the State of West Virginia, did, on the 21st day of July, 1893, deposit in said office for registration fac-similes of a certain trade-mark for — mineral-spring water, and the date of the receipt thereof was duly noted and recorded; that on the 21st day of July, 1893, it deposited therewith a statement, and a written declaration under the oath of Moritz Eisner, an officer of said corporation, copies of all of which are hereto annexed; and the said corporation having made the payment of a fee of twenty-five dollars, and complied with the regulations in such cases prescribed by the Commissioner of Patents, and in all other respects complied with an act of Congress, approved March 3, 1881, entitled "An act to authorize the registration of trade-marks and protect the same," the said fac-similes, statement, and declaration were duly recorded, and the said trade-mark has been duly registered in the said Patent Office this 22d day of August, one thousand eight hundred and ninety-three, and
927 protection therefor will remain in force for thirty years from said date, unless sooner terminated in accordance with section 5 of said act.

In testimony whereof the seal of the Department of the Interior is hereto affixed this twenty-second day of August, 1893, [SEAL.] and of the Independence of the United States the one hundred and eighteenth.

Given under my hand, at Washington, D. C.

S. T. FISHER,
Acting Commissioner of Patents.

Trade-mark
Eisner & Mendelson Company
Mineral-spring water.

No. 23520. Registered Aug. 22, 1893.

Hungarian bitter-water
Budai
Keseruviz.

Hunyady Matyas
Bitter water.
Proprietor: EISNER & MENDELSON CO.,
By JNO. A. WIEDERSHEIM, *Attorney.*

Witnesses:
L. DOUVILLE.
R. H. GRAESER.

928 UNITED STATES PATENT OFFICE,

EISNER & MENDELSON COMPANY, of New York, N. Y.

Trade-mark for Mineral-spring Water.

Statement and declaration of trade-mark No. 23520, registered August 22, 1893; application filed July 21, 1893.

Statement.

To all whom it may concern:

Be it known that the Eisner & Mendelson Company, a corporation created by authority of the laws of the State of West Virginia, domiciled and doing business in the city, county, and State of New York, has adopted for its use a trade-mark for mineral-spring water, of which the following is a full, clear, and exact specification.

The trade-mark consists of the fanciful title "Hunyady Matyäs."

In the accompanying fac-simile to which reference is made, the title "Hunyady Matyäs" is accompanied by the words "bitter water," and preceded by the words "Hungarian bitter water Budai Keserüviz," all in block letters. Above the title is a representation of King Stephen of Hungary, flanked by stars with the letter "M" thereon, but the style of the letters and arrangement of the parts may be varied, and everything omitted excepting the fanciful title "Hunyady Matyas," which is the essential feature of the trade-mark.

This trade-mark said corporation has used continuously in its business since March 1, 1890.

The class of merchandise to which this trade-mark is appropriated is water, and the particular description of goods comprised in such class on which said corporation uses the said trade-mark is mineral-spring water.

929 The trade-mark is used upon labels, bottles, corks, capsules, wrappings, boxes, advertisements, and other means of making the water known to the public.

EISNER & MENDELSON CO.,
By MORITZ EISNER, *Sec'ty.*

Witnesses:

ALBERT L. LOEWE,
CARL FRIEDMANN.

Declaration.

STATE OF PENNSYLVANIA, }
City of Philadelphia. }

Moritz Eisner, being duly sworn, deposes and says that he is secretary of Eisner & Mendelson Company, a corporation created by authority of the laws of the State of West Virginia, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said company has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by said company in commerce with foreign nations, particularly with Austria-Hungary, and that the description and fac-simile presented for record truly represent the trade-mark sought to be registered.

MORITZ EISNER.

Sworn and subscribed before me this 11th day of July, 1893.

[L. S.] D. B. HEMPSTEAD,
Notary Public.

930 DEFENDANT'S EXHIBIT HUNYADI JANOS 1877 U. S. TRADE-MARK.

UNITED STATES PATENT OFFICE.

ANDREAS SAXLEHNER, of Pest, Austria.

(*Trade-mark for Mineral Water.*)

Specification forming part of trade-mark No. 5144 registered September 11, 1877; application filed August 31, 1877.

To all whom it may concern:

Be it known that I, Andreas Saxlehner, domiciled in Pest, and residing thereat, and doing business at said Pest, in the Empire of Austria, have adopted for my use a trade-mark for mineral water, of which the following specification is a full, clear, and exact description.

The trade-mark that is the subject of the application in connection with which this specification or statement is made consists of the word symbol "Hunyadi Janos." It has been applied in the form and manner shown in the accompanying labels. The trade-mark—to wit, the word symbol "Hunyadi Janos"—has been displayed at the top or upper field of the label, followed by the words "Budai Keseruviz Forras," below which has been placed a medallion showing the head of a knight with helmet removed, with scroll-work upon either side of the medallion. Immediately under the medallion the trade-mark has been repeated, followed by printed matter descriptive of the article. The ground or field of the label has been red, the letters and medallion ornamentation being in blue and black, or white and black, the whole inclosed in a border of red and disposed and arranged as shown in the accompanying labels aforesaid.

The trade-mark, however, consists, essentially, of the said
931 word symbol "Hunyadi Janos," without regard to any one or more of the parts and features aforesaid, in connection with which it has been used.

It is not to be understood from the foregoing that I in anywise curtail, relinquish, waive, or abridge my right to the exclusive use of the said medallion, the label as a whole, or to any one or more of the parts or features aforesaid, the distinctions hereinbefore recited being made only to the end that the particular trade-mark sought to be protected hereby may be clearly understood.

The said trade-mark has been used by me for a period of not less than fourteen years last past.

The particular goods upon and in connection with which the said trade-mark has been used and applied has been mineral water. It has been printed in the form and manner hereinbefore set forth upon paper labels, which have been attached to the bottles in which the water has been put upon the market. I intend to use it in every lawful manner at will, as may appear to be expedient.

ANDREAS SAXLEHNER.

Witnesses:
O. SNODERERLEY.
WILLIAM HAINEY.

932 DEFENDANT'S EXHIBIT HUNYADI MATYAS PHILLIPS NOVEMBER ORDER.

Date Nov. 5, '96.

Order No. 3176.
Messrs. J. E. Phillips.
Ship to Titusville.
At ——, Penn.
How: Ship from N. Y.
When: At once.
Terms: Regular.

1 case Hunyadi Matyas water at..... $7.00

(Seal brand.)
F. O. B. via Empire line.

J. E. PHILLIPS.

DEFENDANT'S EXHIBIT PHILLIPS LETTER NO. 1.

J. E. Phillips, druggist, Exchange block, No. 40 West Spring street.

TITUSVILLE, PA., *Nov.* 10, 1896.

Eisner & Mendelson Co., New York.

GENTLEMEN: The case of Hunyadi Matyas has arrived and I shall hold the same subject to your order for the reason that your agent obtained my order for the same through misrepresentation, to the effect that the Hunyadi Janos was no longer on the market, that the bottling of it had been discontinued and any water of that brand was now worth a premium. I find on the contrary advertisements of the Hunyadi Janos (Red Diamond brand) in drug journals of recent date, and that there is no trouble in obtaining supplies of the water.

Y'rs truly, J. E. PHILLIPS.

933 DEFENDANT'S EXHIBIT PHILLIPS LETTER NO. 2.

NOV. 11TH, 1896.

J. E. Phillips, Titusville, Pa.

DEAR SIR: We have your valued favor of the 10th, and are more than surprised at its contents, as it is the first intimation we have ever had that Dr. L. C. Franz has misrepresented any of our goods.

In reference to the Apollinaris Co.'s Hunyadi water, their brand is now called the "Apenta" which is the Diamond brand. Andreas Saxlehner's does not contain the red diamond.

He, surely, could not have stated to you that either of these waters *are* out of the market and there certainly must be a misunderstand-

ing somewhere. We beg to assure you that we very much regret the occurrence.

We trust you will reconsider your action and take the case of Hunyadi Matyas in stock, as we feel quite sure you will find same a ready seller. From the enclosed slip you will see that it received the highest award at the Columbian exposition.

Awaiting your further valued commands, we remain,

Very truly yours, EISNER & MENDELSON CO.,
Per MENDELSON.

934 DEFENDANT'S EXHIBIT PHILLIPS LETTER No. 3.

J. E. Phillips, druggist, Exchange block, No. 40 West Spring street.

TITUSVILLE, PA., *Nov.* 12, 1895.

Eisner & Mendelson Co., New York.

GENTLEMEN: Your favor of the 11th is at hand. In reply I enclose labels taken from a bottle of water which your agent informed me had been taken out of the market, and said that it would be worth a premium in a short time. Is not Andreas Saxlehner's Hunyadi Janos indentically the same water that the Apollinaris Co. put their red diamond on?

I have concluded to keep the case of Hunyadi Matyas. I have just received a warning circular from Saxlehner's attorney, claiming that the use of the name "Hunyadi" is an infringement, and threatening prosecution of any parties selling waters other than Andreas Saxlehner's with that name on the label.

J. E. PHILLIPS.

DEFENDANT'S EXHIBIT PHILLIPS LETTER No. 4.

Mr. J. Phillips, Titusville, Pa.

DEAR SIR: Replying to your valued favor of the 12th, the water which Andreas Saxlehner is now selling, has the identical label which you enclosed, but without the red diamond, as the Apollinaris Co. are claiming said red diamond, and are putting it on the Apenta bitter water.

935 The Hunyadi Matyas water, as you are aware, has the red seal, as our guarantee of its genuineness.

The Hunyadi Matyas water has been sold in the markets of the world ever since 1873, in which year the trade-mark "Hunyadi Matyas" was registered at Budapest, Hungaria, and we shall protect the entire trade in selling the same.

Awaiting your further valued commands,

Very truly yours, EISNER & MENDELSON CO.,
Per J. MENDELSON.

DEFENDANT'S EXHIBIT PHILLIPS POSTAL CARD.

(Postal card addressed as follows:)

EISNER & MENDELSON CO.,
New York.

GENTLEMEN: Please send me by Empire line 1 case Hunyadi Matyas water at best price, and oblige

Yours truly,
J. E. PHILLIPS,
Titusville, Pa.

(Empire line.)
(Pier 28.)

936 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER
v.
EISNER & MENDELSON COMPANY.

SAME
v.
SIEGEL-COOPER COMPANY.

SAME
v.
RUDOLPH GIES.

SAME
v.
LOUIS MARQUET.

SHIPMAN, *C. J.:*

These four bills in equity were brought to restrain the improper use of the complainant's trade-marks and labels, and in the three cases against retailers to restrain the fraudulent sale of the water from wells not of the complainant as the product of the wells which she owns.

937 The jurisdiction of the court is founded upon the citizenship of the parties. The complainant resides at Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary. The Eisner & Mendelson Company is a corporation of the State of West Virginia, and transacts its entire business in New York city. The other three defendants are residents of the city of New York and citizens of the State of New York.

The following facts, which were alleged in the bills of complaint, or which are incidental thereto, were clearly proved:

Andreas Saxlehner, in about the year 1863, commenced to bottle the waters of a well of bitter water owned by him, situated within the city limits of Budapest, Hungary, and for the purpose of distinguishing the bitter waters of this spring from other waters then

known and on sale, adopted, in 1865, the arbitrary name or trade-mark of "Hunyadi Janos" for the water of his spring. Hunyadi Janos, or John of Hunyad, was a Hungarian hero who lived in the fifteenth century.

The business soon increased, additional wells were sunk by him in the same territory which gave forth similar water, and in the course of time the water was exported beyond the limits of Hungary to other countries of Europe and also to the United States. When Saxlehner commenced this business he adopted a characteristic and novel style of bottles, the same being of a straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos, Budai Keseruviz" (meaning Hunyadi Janos bitter water of Buda), together with a portrait, supposed to be the portrait of the hero, stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which were a division of the same into three longitudinal fields, the middle field bearing the said portrait in a medallion with the name "Hunyadi Janos" written in
938 large letters on the top part of the label, the color of the middle field being red. As this water was exported to and sold in the various countries of the world a different custom concerning its appellation sprung up in different countries, the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos," or "Acqua di Janos;" while in England and the United States of America the name "Hunyadi" became its common appellation, it being known as "Hunyadi water."

In the month of March, 1876, Andreas Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which he gave it the exclusive opportunity of selling his Hunyadi Janos water in Great Britain, the United States of America and other transmarine countries for a term of years, which terminated finally on March 25, 1896. About this time a label was designed to be used on the bottles which were to be sold by the Apollinaris Company, Limited, of substantially the same contents and characteristic features, but of a different color, the body of the label being a blue color, retaining, however, the red color of the central field. A narrow strip on top of the label was added containing the imprint of the Apollinaris Company as importers, and ever since the making of this contract large quantities of Hunyadi Janos water bearing this blue and red label were exported to the United States and sold here, the water being ordered and sold under the short name "Hunyadi" or the full name "Hunyadi Janos." In the year 1889 Andreas Saxlehner died, whereupon his widow, the complainant, succeeded him in the business of bottling and exporting the Hunyadi Janos water, and since the termination of the contract with the Apollinaris Company, Limited, she has continued to export to the United States and sell here the Hunyadi Janos water in the same bottles and with substantially the same labels, the name of her firm being substituted in place of that of the Apollinaris Company on the labels.
939 In the year 1887 Andreas Saxlehner caused the name "Hunyadi" to be registered as his trade-mark for natural aperient

waters in the United States Patent Office. By reason of the great care exercised by complainant and her predecessors in business in bottling it, the water has become widely and favorably known, and is commonly designated by consumers in the United States as "Hunyadi" water. Until the year 1890 complainant did not enjoy adequate protection in Hungary in the use of her trade-marks and labels on account of a lack of statutes regulating such matters, by reason of which fact other persons in Hungary and in Europe used the name "Hunyadi" in connection with other names, imitating her labels, capsules and bottles, and she was unable to stop these practices; since 1890 the law of Hungary has been changed and she has succeeded in causing all these marks and labels to be suppressed in Hungary, including also the use of the names "Hunyadi Laszlo" and "Hunyadi Matyas."

The bill of complaint complained of two different kinds of labels used by defendants in the sale of Hungarian bitter waters, one being marked with the name "Hunyadi Matyas," while the other is marked with the name "Hunyady Laszlo," both labels being otherwise closely similar to complainant's label in their color, size, shape and general arrangement, stress being laid upon the tripartite division already described, the medallion portrait on the centre label, the blue and red color, the name "Hunyadi," and also the similarity of the capsules used on both bottles, the bottles being of the same size and shape. It is alleged that these were adopted by the defendants with full knowledge of the complainant's rights and for the purpose of imposing upon the public and depriving the complainant of the benefits of her business. The bill of complaint thus is of a twofold character, being brought for infringement of trade-mark rights of the complainant, and also to enjoin an unfair competition by means of simulated labels and insignia of
940 trade. A decree for permanent injunction, damages, profits and costs was prayed for.

The wells of Andreas Saxlehner, which finally became 112 in number, are situated in the Valley Orsod, near the inhabited part of the city Budapest, and cover an extent of one hundred acres and produce an aperient water.

In 1873, one Ignatius Markus, the proprietor of a spring of bitter water in Budapest, applied to the city authorities for permission to call the spring and its water by the name "Hunyadi Matyas," and to register this name as a designation of the water. This application was successfully opposed by Saxlehner before the local authorities, but the decision was reversed upon appeal to the minister of agriculture, who held that the two names were sufficiently distinct and that it sufficiently appeared that the waters of the springs were of the same quality, and granted Markus' petition. Afterwards this spring was registered in Budapest by the name of Hunyadi Matyas.

Thereupon the proprietors of other wells commenced to sell their waters in Europe under the name Hunyadi, with some added name, with the use of a close imitation of the red and white labels.

Saxlehner made, in 1887, another unsuccessful attempt to stop

the employment of the name Hunyadi when applied to the water called Hunyadi Joseph. His Hunyadi Janos water had been sold by him in the United States under the red and white label, to a limited extent, before March, 1876, when he made his contract with the Apollinaris Company of London. By the contract he "abandoned" to that company the exclusive sale of his Janos water in this country. It was to pay specified prices, it agreed to take yearly 100,000 half or entire bottles, and to sell no other bitter water. The goods were to travel at its risk, Saxlehner was to furnish careful package and faultless bottling. Upon the red part of the label
941 there was a warning signed by Saxlener that "imitation of this water, or of the label or of the capsule, will be the subject of legal proceedings at the instance of the Apollinaris Company," but the company did not agree to institute such proceedings.

The contract was for ten years, and was afterwards extended for twenty-five years beginning January 1, 1876, but the company could withdraw upon twelve months' notice. Saxlehner had no such right of cancellation.

The company went on in the business of selling Janos water in the United States without a competitor of importance until 1886, and succeeded in developing a very large business, and the water had secured for itself a high popular and medical reputation under the short name "Hunyadi." In 1886, Mattoni & Wille, of Budapest, consigned to one Andreas in New York one hundred and twenty-one cases of their "Hunyadi Matyas" bitter water. This firm had bought four spring in Budapest, one of their purchases being the original Markus spring, and in 1877 they registered in Hungary four trade-marks for four several wells, viz: Szcihenyi, Deak, Sz-Istvan and Hunyadi Matyas. Ignatz Ungar & Son became in 1880 the owner of a Budapest spring, which they called "Hunyadi Arpad," and registered the name in Hungary, and in 1886 began to sell the water from it in New York city through Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels; the Matyas bearing the words "Hunyadi Mathias Quelle" in small print was put up in red and white labels.

Suits were promptly, and before Andreas had an opportunity to sell his lot, commenced in 1886 in the United States circuit court for this district by the Apollinaris Company against these agents to enjoin against the use of the trade name "Hunyadi" and of the labels, but were withdrawn on the ground of want of jurisdiction and two suits, one against Andreas and the other against
942 Ungar, were brought by the Apollinaris Company in the supreme court in the city of New York. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when on application of the defendant in the Ungar case, the injunction in that suit was dissolved, no one appearing in opposition, and soon after the injunction in the Andres suit was dissolved without objection, and the suit was voluntarily discontinued.

An attempt was made by the Eisner & Mendelson Company to show that the Apollinaris Company notified Saxlehner of the pen-

ency of the motion to dissolve the injunction in the Ungar case, and his refusal to assist in the opposition, but the offered testimony was merely hearsay and was inadmissible.

After the dissolution of these injunctions, the Hunyadi Arpad and the Hunyadi Laszlo waters were sold in this country by the agent of Ungar, until 1892, who also sold the Hunyadi Bela water to a limited extent, all under the general name of Hunyadi, and with the imitation red and blue label. The Arpad water was extensively advertised. The sale of the Matyas water was not renewed, but the quantity on hand was disposed of under changed labels.

The Apollinaris Company published in April 6, 1889, and thereafter in 1889 and 1890, the following advertisement:

"The Appollinaris Company, Limited, London, beg to announce that as numerous aperient waters are offered to the public under names of which the word 'Hunyadi' forms a part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond. This label will henceforth also serve to distinguish the Hungarian aperient water sold by the company from all other aperient waters."

After April, 1889, and until the cancellation of the contract
943 in 1896, this company placed upon each bottle of Janos water which it sold in this country, a red diamond, containing these words, "The red diamond is the trade-mark of the Apollinaris Company, Limited, and is meant only to indicate that the mineral waters, so marked, are sold by the Apollinaris Company, Limited."

In 1886 or 1887 the Apollinaris Company purchased a spring of bitter water under the name of Apenta, in Budapest, and, immediately upon the dissolution of the contract, began to push the sale of this water in this country and in England, under the name of "Apenta from the Uj (new) Hunyadi springs at Budapest," with the Red Diamond label. Its use of the word Hunyadi was stopped by injunction in England in June, 1897, and was abandoned in this country.

The Eisner & Mendelson Company of Pennsylvania, the predecessor of the present defendant, which was organized in April, 1892, and succeeded to all the business and contracts of its predecessor, made a contract dated July 30, 1889, with Heinrich Mattoni, the owner of the springs, the water of which had been sold by Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of the bitter waters which he owned, for the term of twenty years from September 1, 1889.

Eisner, who acted for the Eisner & Mendelson Company, saw half a dozen different Mattoni labels, but devised a new one for the American market and imported some 20,000 bottles in 1889 and 1890, under the name "Royal Hungarian bitter water" upon a red and white label. In July, 1890, the Eisner & Mendelson Co. took a lease for five years with an option for a renewal for twenty years thereafter, from Mattoni, of the so-called "Hunyadi Matyas spring No. 2" and became entitled to have all the bitter water for its American use bottled from this spring. This lease superseded the

previous contract. The reason which induced Eisner to
944 make this lease, was his desire to control the American label so that neither Mattoni & Wille nor European purchasers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label and is described in the complaint, containing the name "Hunyadi Matyas" "Buda Keseruviz" and a medallion portrait of King Stephen in the centre of the red division. He intentionally simulated the Saxlehner United States label for the purpose of obtaining, by means of the simulation, a part of the good will which the Janos water had gained. This "Matyas Spring No. 2" was not the original Matyas spring, in regard to which Markus had his litigation in 1873, but was another spring called the "Franz Deak" spring, which Mattoni & Wille bought in 1876 from Michael Ivanyi and wife, and was the spring registered in 1877 under the name "Deak."

In May, 1890, the Eisner & Mendelson Company commenced vigorous measures to advertise this water and introduce it through circulars and newspapers and sample bottles, to the druggists and to the physicians. It was extensively advertised as a Hunyadi water, and being sold below the market price of the Janos water, has been largely bought, especially by druggists who receive the custom of the class which desires economy.

On May 2, 1892, the present Eisner & Mendelson Company entered into a contract with Ignatz Ungar & Sons for the sole agency in the United States of their waters from four Hungarian springs, the Hunyadi Arpad, Hunyadi Bela, Victoria and Racoczy Georgy, and acquired by purchase from Perrine & Co., the Ungar agents in New York, their rights under the contract which they had held. In April, 1892, it acquired from a Paris corporation the exclusive right to the sale in this country of a Hungarian bitter-spring water called "Hunyadi Laszlo." These various waters, with the exception of the Victoria and the Georgy, were sold under the name Hunyadi and with the red and blue label.

945 In April, 1893, the Apollinaris Company, for the purpose of counteracting the idea that the Eisner & Mendelson Co. had become lessees of all the Hunyadi springs, issued an advertisement and postal cards, of which the following is the important part:

"Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced the Hunyadi Janos water, the proprietor in Budapest of the springs having entrusted to them, for a term of years still unexpired, the sole sale of this water in England and in all transmarine places. Hunyadi Janos water having become very popular, quite a number of other waters are now offered for sale, under names, of which the word Hunyadi forms part, and in bottles and with labels, closely resembling in appearance and color those long used for Hunyadi Janos water.

The word 'Hunyadi' having become a general name for Hungarian bitter waters, good, bad, or indifferent, the Apollinaris Com-

pany affixed to the bottles of Hunyadi Janos, the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited."

On July 6, 1893, the complainant bought from Ignatz Ungar & Sons the Ungar springs, the Ungar contract with the Eisner & Mendelson Company was terminated, and the importation of those waters ceased. In 1895, or 1896, the defendant ceased to import the Laszlo waters.

In 1893, the Eisner & Mendelson Company began to use and has used ever since, upon their standard bottles of Matyas water, an additional label consisting of a red seal upon a white ground and containing the words "Ask for the Seal brand. This label
946 has been adopted to protect the public from imitation and as a guarantee of the genuineness of the Hunyadi Matyas water imported solely by Eisner & Mendelson Co., New York." The attention of druggists has been called to this Seal brand by advertisements in the trade papers. The Mattoni lease was renewed for twenty years from March 1, 1895. The Apollinaris Company during the continuance of its Saxlehner contract did not object to the Eisner & Mendelson Company's operations or trade-marks, or representations, except in one particular, which was changed at the former's request.

The following table, compiled by the agent of the Apollinaris Company, from the Journal of Commerce and Bonfort's Journal, which are considered to be authorities upon the subject of importations, states the number of cases of so-called Hunyadi water, other than Janos, reported in those journals to have been imported into the United States from 1886 to 1896, inclusive:

Importation into the United States of the following waters:

Name.	1886.	1887.	1888.	1889.	1890.	1891.	1892.	1893.	1894.	1895.	1896.	Total.
Hunyadi Arpad	201	.....	1,000	7,649	7,979	3,752	4,438	2,882	Jan. 1	to Ap'l 30.		27,901
" Corvin	.....	.....	.....	.....	20	.....	.....	.....	.....	.....	.....	20
" Matyas	.....	.....	.....	.....	2,590	4,662	4,531	1,954	6,210	5,185	520	25,652
" Laszlo	.....	.....	.....	.....	200	.....	397	264	936	268	.....	2,065
" Bela	.....	.....	.....	.....	.....	397	268	284	.....	.....	.....	949
" Jozsef	.....	.....	.....	.....	.....	132	.....	.....	144	.....	.....	276
" Lajos	.....	.....	.....	.....	.....	667	2,265	2,772	5,148	528	.....	11,380
" Miklos	.....	.....	.....	.....	.....	.....	.....	.....	132	.....	.....	132
" Vilmos	.....	.....	.....	.....	.....	.....	.....	.....	.....	263	.....	263

The figures given represent cases each containing fifty (50) bottles.

In 1894, and in October, 1886, the Hungarian minister of commerce canceled all the Hunyadi Matyas trade-marks and also five illustrated labels for Hunyadi Matyas bottles, and also canceled the Hunyadi trade-marks of all the claimants or users thereof, except the one belonging to the complainant. This action was taken
947 upon her petition and under authority of progressive Hungarian *litigation* on the subject in 1890 and in 1895, so that it is established in Hungary that the complainant is alone entitled

to the use of the word "Hunyadi." This litigation was vigorously conducted by the complainant. The questions in regard to the right of the Eisner & Mendelson Co. to the use of the name Hunyadi and of the Saxlehner label depend upon circumstances which differ in important particulars. The Hunyadi question is by far the most important to the parties.

In 1886, when substantial competition in the sale of Hunyadi bitter waters made its appearance in this country, the name Hunyadi was in fact the established trade-mark of the Janos water. It was prevented from taking that position in Hungary or in continental Europe by the decision of 1873, which declared that Hunyadi Janos and Hunyadi Matyas were different names. Whether, upon an attack, Saxlehner could have then maintained his right to have an exclusive use of the name in this country is not now clear. The Apollinaris Company having obtained *ex parte* injunctions, abandoned them in 1888, influenced in part probably by the failure of Saxlehner in the Hunyadi Joseph litigation of 1887, published their advertisement of 1889, which announced that their red diamond would serve to distinguish the Janos water, and again in 1893 published a notice that the word "Hunyadi" had become a general name for Hungarian bitter waters of all varieties of excellence. Much reliance has been placed by the defendant upon these statements, upon the theory that they were made by the agents of Saxlehner. The Apollinaris Co. was never an agent of the owner of the well. Their relations were those of seller and buyer. The company simply agreed to buy a specified number of bottles yearly and to introduce no other bitter water. It did not agree to use any other efforts to protect the good will or the trade-marks of Saxlehner, or to use any efforts to promote his business or his
948 pecuniary interests, and it could cancel the contract upon notice. Inasmuch as it was the sole person who had the right to sell the Janos water in this country and to use its trade-mark and to enjoy the good will of the business, it was in a position in which it could in fact destroy the name and the good will, if its own interest dictated such a course. In considering the reasons legal and commercial, which induced the Apollinaris Company to publish its advertisements and to rely upon its Red Diamond label, it is right to say that the history of the Hungarian litigation and of the continental use of "Hunyadi" presented a legal reason, which was at least very plausible for the conclusion that kindred waters could use the name anywhere and served to embarrass a litigant in the attempt to enforce an exclusive right to it in the United States. Whatever may have induced the action of the Apollinaris Company it did, notwithstanding the name had become localized here, abandon, in terms and positively, a claim to a right to its exclusive use and affirmed that had become in practice a general name. As the name had become in fact a trade name in 1886, so, also, it could by affirmation and positive action cease to be such, and when it had publicly become open to use by competitors, the persons who invested their money, in the honest belief that the name was public property, should have a fair standing in a court of equity. I am

obliged to say that by the positive action of the corporation, which alone had the right to the enjoyment of the name in this country, and which had the right to bring suits for its protection, it became, after 1888, one which dealers in Hungarian bitter waters could use a prefix to the other specific name of the respective waters. They could not call their water "Hunyadi," but they could use the word as a prefix.

Two causes contributed to this result, first, the action of the Hungarian authorities, and secondly, the careless contract by
949 which the Apollinaris Company entered into no contractual obligations to protect Saxlehner's interest or property.

The question in regard to the label is a different one. The red and blue label was Saxlehner's label in England and in this country. He devised it, and his sole right to its use was never entangled by any claim of a public right to use it wherever Hungarian bitter waters are sold, and before the injunctions were dissolved in 1888, his exclusive right in this country was undeniable. After the dissolution it was used upon the Arpad water, until July, 1893, when its further use was effectively stopped by the action of the complainant. It was not used upon the Matyas water until 1890, when the defendant abandoned the use of the Mattoni label, which it had devised, and assumed the insignia of the Janos water, with a simulated change of color from red to reddish brown. It is said, however, that the Apollinaris Company also abandoned to the public any claim to an exclusive right to a red and blue label. Its action in regard to the name was positive, but it neither asserted nor admitted anything in regard to the label. It simply did not act against its use upon the Arpad water, which as the table of importations shows, was the only competitor of importance until 1890, nor against the Matyas, which did not come into the field with this label until July, 1890. The other waters whose names were frequently repeated in the record, were of no importance as competitors, certainly until 1895, when the Apollinaris Company gave notice of its intent to cancel the contract. Its conduct in regard to labels was that of indifference and of laches and can give no rights, as against the complainant, to the Eisner & Mendelson Company, who started in 1890 to use her label and feigned to have avoided it. The charge of laches against the complainant or her predecessor is not adequately sustained. Neither of them could practically accomplish anything through litigation in this country, until the cancellation of the Apollinaris contract. In November, 1895, the son
950 of the complainant came to this country to take charge of his mother's business, and he has been active in litigation since the contract closed, and in October, 1896, notified the defendants of his proposed suit against it. The defendant has, however, since 1893, for the purpose of having a mark of its own and thus avoid the injurious effect of new competition, used a distinctive "Seal brand," which is a red seal upon a white ground, large enough and peculiar enough to be easily recognized, and which informs the public, in substance, that the water is Matyas water and is sold only by the defendant. Inasmuch as the name Hunyadi can be

used in this country by rivals of the Janos water, I think that thi label is a sufficient attempt on the part of the defendant to asser that it is the seller of Matyas water, and that since 1893 it frees th complainant from the charge which before that time was true, tha it was cajoling or deceiving the ordinary retail purchaser into th belief that he was buying the Janos water. This freedom applie only to the water sold under the "Seal brand."

In the spring of 1896 the Eisner & Mendelson Company importe a few hundred cases of another kind of Matyas water, which wa called No. 3 and which they sold without the Seal brand and wit 3 marked upon the red and blue label. It would not be an infring ment, except for the use of the three well-known longitudinal re and blue fields of the Saxlehner label, the field covering the whol bottle, and the red field in the middle with a medallion portrai The company ceased to import this water and it also ceased in 189 or 1896 to import the Laszlo water, which was sold under its re and blue label, but it claims the right to sell these or any othe Hunyadi waters under the simulated label of Saxlehner. It cease to make these importations for financial reasons only.

Let there be an interlocutory decree against further infringemen of this label and for an accounting for the damages occa
951 sioned by past infringements since April 13, 1892, the date the organization of the defendant. The question of costs wi be reserved until final decree.

The cases against retailers, which were based upon instances of fraudulent sale of Matyas water, representing it to be Janos, wer defended by the Eisner & Mendelson Company, and all the cas were presented in one record.

There is no substantial evidence of fraudulent conduct on the pa of Siegel-Cooper Company, and the bill is dismissed, without cost The testimony in regard to sales at the retail drug stores of Rudolp Gies and Louis Marquet satisfies me that the clerk in charge each of those stores, in response to special requests for Janos wate wrapped up and delivered bottles of the Matyas water of the Eisn & Mendelson Company. In each case the witnesses were evident mistaken in regard to the figure and complexion of the clerk, but have little doubt that the man in charge made the deliveries testified. Their sales were probably not large enough to justify th expense of taking an account, but there should be in each case a injunction against a sale of Matyas water as and for the Jan water of the complainant, without costs.

Antonio Knauth for the complainant.
Edmund Wetmore and Charles G. Coe for the defendants.

(Endorsed:) U. S. circuit court, southern district of New Yor Emilie Saxlehner *v.* Eisner & Mendelson Company. Same *v.* Sieg Cooper Company. Same *v.* Rudolph Gies. Same *v.* Louis Marqu Opinion. Shipman, C. J. U. S. circuit court. Filed Jun 28, 189 John A. Shields, clerk.

952 At a stated term of the circuit court of the United States of America, in and for the southern district of New York, held at the city of New York, on the 29th day of April, 1898.

Present: Hon. Nathaniel Shipman, circuit judge.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

This cause having come on to be heard on the bill of complaint herein, the answer of the defendant, the replication of the complainant herein, and the proofs, oral, documentary and written, taken and filed in said cause, and after having been argued by counsel for the respective parties and submitted to the consideration of the court upon their respective briefs:

Now, therefore, upon consideration thereof, and on motion of Briesen & Knauth, complainant's solicitors, it is—

Ordered, adjudged and decreed, and the court does order, adjudge and decree as follows, to wit:

1. That since its organization in the year 1892, and before the commencement of this suit, the defendant herein has infringed upon the exclusive rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water, by wrongfully
953 and fraudulently selling and offering for sale in the southern district of New York and elsewhere in the United States bitter water in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck and bearing labels in color, size, shape and general design so closely similar to complainant's said labels as to be calculated to deceive, the said labels being divided into three panels, the central panel being red or of a reddish brown and bearing a portrait in a medallion, and the side panels being blue, one kind of said defendant's labels bearing the name "Hunyadi Laszlo," another kind the name "Hunyady Matyas" and another the name or description "Hunyady Matyas No. 3."

2. That an injunction issue herein perpetually restraining and enjoining the defendant The Eisner & Mendelson Company, its officers, servants, agents and all persons in privity with it or them, from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant in bottles bearing labels like those heretofore used by said defendant and above described, and from selling or offering for sale any such bitter water under labels imitating complainant's Hunyadi Janos labels in size, color, shape and general arrangement so closely as to be calculated to deceive the public into the belief that they are complainant's labels.

3. That the complainant recover from the defendant the damages which she has sustained by reason of the sale by defendant of bitter water bearing the red and blue labels described in the first paragraph of this decree and bearing the names or descriptions "Hunyady Matyas," "Hunyadi Laszlo" and "Hunyady Matyas No. 3," respectively, since the organization of the defendant company in

the year 1892; and from the sale of any bitter waters under any other red and blue labels so similar to said complainant's labels as to be calculated to deceive, and that it be referred to John A.
954 Shields, Esq., he having been agreed on by the parties and being very conversant with accountings, which are special and sufficient reasons for his appointment, who is hereby appointed special master for the purpose of this suit, to ascertain and take and state and report to the court an account of all the gains, profits and advantages which the said defendant has received or which have arisen or accrued to said defendant since the incorporation of said defendant company in the year 1892 from the use of said simulated red and blue labels upon the bitter water sold by it, and to ascertain and state the damages suffered by complainant by reason of such unlawful sale and offering for sale.

4. And it is further ordered, adjudged and decreed that the complainant on such accounting have the right to cause the examination of the defendant, its officers, agents, servants and workmen and such other witnesses as may be necessary to take said accounting, and also have the right on such accounting to the production of the books, vouchers, documents and other papers of which said defendant, its officers, servants, agents or workmen may be possessed before said master from time to time as such master may direct.

5. It is not intended by this decree to restrain the defendant from using the name "Hunyady" or "Hunyadi" as a prefix to some other name than "Janos," or to sell or advertise for sale its water as Hunyadi water nor from selling it under the said red and blue label bearing the name "Hunyady Matyas" in connection with the defendant's "Seal Brand" label *patented* thereon, and the injunction demanded by complainant against such use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos" is hereby denied. No damages for the sale of bottles of bitter water bearing said red and blue Hunyady Matyas label
955 in connection with said "Seal Brand" label pasted thereon are to be recovered.

6. That the question of costs be, and the same is hereby, reserved until the entry of a final decree.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Eisner & Mendelson Company, defendants. Interlocutory decree. Briesen & Knauth, solicitors for complainant, 229 Broadway, borough of Manhattan, New York. U. S. circuit court. Filed Jul- 18, 1898. John A. Shields, clerk.

At a stated term of the circuit court of the United States of America in and for the southern district of New York, held at the city of New York, on the 29th day of April, 1898.

Present: Hon. Nathaniel Shipman, circuit judge.

EMILIE SAXLEHNER, Complainant,
vs.
SIEGEL-COOPER COMPANY, Defendant.

This cause having come on to be heard on the bill of complaint herein, the answer of the defendant, the replication of the complainant herein, and the proofs, oral, documentary and written,
956 taken and filed in said cause, and after having been argued by counsel for the respective parties and submitted to the consideration of the court upon their respective briefs:

Now, therefore, upon consideration thereof, and on motion of Charles G. Coe, defendant's solicitor, for a decree, it is, for the reasons stated in the opinion which was filed in said cause,

Ordered, adjudged, and decreed, and the court does hereby order, adjudge, and decree as follows, to wit:

That bill of complaint be, and the same is hereby, dismissed without costs to either party.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Siegel-Cooper Company, defendant. Final decree. Charles G. Coe, solicitor for defendant, Temple court, 5 Beekman street, New York city. U. S. circuit court. Filed Jul- 18, 1898. John A. Shields, clerk.

957 At a stated term of the circuit court of the United States of America, in and for the southern district of New York, held at the city of New York, on the 29th day of April, 1898.

Present: Hon. Nathaniel Shipman, circuit judge.

EMILIE SAXLEHNER, Complainant,
vs.
RUDOLPH GIES, Defendant.

This cause having come on to be heard on the bill of complaint herein, the answer of the defendant, the replication of the complainant herein, and the proofs, oral, documentary and written, taken and filed in said cause, and after having been argued by counsel for the respective parties and submitted to the consideration of the court upon their respective briefs:

Now, therefore, upon consideration thereof, and on motion of Briesen & Knauth, complainant's solicitors, for a decree, it is

Ordered, adjudged, and decreed, and the court does hereby order, adjudge, and decree as follows, to wit:

1. That before the commencement of this suit the defendant herein has infringed upon the exclusive rights of the complainant to the name "Hunyadi Janos" as a trade-mark for bitter water and upon her exclusive rights to the red and blue labels used on her
958 said Hunyadi Janos bitter water by wrongfully and fraudulently selling in the southern district of New York bitter water not coming from the Hunyadi Janos wells of the complain-

ant, in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck and bearing labels in color, size, shape, and general design so closely similar to complainant's said labels as to be calculated to deceive, the said labels being divided into three panels, the central panel being red or of a reddish-brown, bearing a portrait in a medallion, and the side panels being blue, said labels containing the name "Hunyady Matyas," which bottles of bitter water said defendant has sold as and for the Hunyady Janos water of the complainant.

2. That an injunction issue herein perpetually restraining and enjoining the defendant Rudolph Gies, his servants, agents and all persons in privity with him or them, from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant in bottles, and with labels as above described, or any similar bottles, as and for the Hunyadi Janos bitter water of the complainant.

3. That the perpetual injunction demanded by the complainant enjoining the defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells, either alone or as a prefix to some other name than "Janos," and from selling any bitter water not coming from complainant's Hunyadi Janos wells as and for "Hunyadi" water, be and the same is hereby refused; and further, that the injunction demanded by the said complainant, enjoining the defendant from the sale of any bitter water not coming from her said Hunyadi Janos wells, under the red and blue labels bearing the name "Hunyady Matyas" and
959 provided with the additional "Seal Brand" label of the Eisner & Mendelsen Company, be and the same is hereby likewise refused.

4. That no accounting for damages or profits shall be had and no costs shall be recovered by complainant from defendant.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Rudolph Gies, defendant. Final decree. Briesen & Knauth, solicitors for complainant, 229 Broadway, borough of Manhattan, New York. U. S. circuit court. Filed Jul- 18, 1898. John A. Shields, clerk.

At a stated term of the circuit court of the United States of America in and for the southern district of New York, held at the city of New York, on the 29th day of April, 1898.

Present: Hon. Nathaniel Shipman, circuit judge.

EMILIE SAXLEHNER, Complainant,
vs.
LOUIS MARQUET, Defendant.

This cause having come on to be heard on the bill of complaint herein, the answer of the defendant, the replication of the complain-

ant herein, and the proofs, oral, documentary and written,
960 taken and filed in said cause, and after having been argued by counsel for the respective parties and submitted to the consideration of the court upon their respective briefs:

Now, therefore, upon consideration thereof, and on motion of Briesen & Knauth, complainant's solicitors, for a decree, it is—

Ordered, adjudged and decreed, and the court does hereby order, adjudge and decree as follows, to wit:

1. That before the commencement of this suit the defendant herein has infringed upon the exclusive rights of the complainant to the name "Hunyadi Janos" as a trade-mark for bitter water, and upon her exclusive rights to the red and blue labels on her said Hunyadi Janos bitter water, by wrongfully and fraudulently selling in the southern district of New York bitter water not coming from the Hunyadi Janos wells of the complainant, in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck and bearing labels in color, size, shape and general design so closely similar to complainant's said labels as to be calculated to deceive, the said labels being divided into three panels, the central panel being red or of a reddish brown and bearing a portrait in a medallion, and the side panels being blue, said labels containing the name "Hunyadi Matyas," which bottles of bitter water said defendant has sold as and for the Hunyadi Janos water of the complainant.

2. That an injunction issue herein perpetually restraining and enjoining the defendant Louis Marquet, his servants, agents and all persons in privity with him or them, from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant, in bottles and with labels as above described,
961 or any similar bottles, as and for the Hunyadi Janos bitter water of the complainant.

3. That the perpetual injunction demanded by the complainant enjoining the defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells, either alone or as a prefix to some other name than "Janos," and from selling any bitter water not coming from complainant's Hunyadi Janos wells as and for "Hunyadi" water, be and the same is hereby refused; and further, that the injunction demanded by the said complainant enjoining the defendant from the sale of any bitter water not coming from her said Hunyadi Janos wells, under the red and blue labels bearing the name "Hunyady Matyas," and provided with the additional "Seal Brand" label of the Eisner & Mendelson Company, be and the same is hereby likewise refused.

4. That no accounting for damages or profits shall be had and no costs shall be recovered by complainant from defendant.

N. SHIPMAN,
Circuit Judge.

(Endorsed:) United States circuit court. Emilie Saxlehner, complainant, *vs.* Louis Marquet, defendant. Final decree. Briesen & Knauth, solicitors for complainant, 229 Broadway, borough of Man-

hattan, New York. U. S. circuit court. Filed Jul- 18, 1898. John A. Shields, clerk.

962 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
EISNER & MENDELSON COMPANY, Defendant and Appellee.
} In Equity.

In pursuance of and obedient to rule 11, formulated and adopted by the United States circuit court of appeals for the second circuit, the above-named complainant respectfully makes the following assignment of errors in the above-entitled case, to wit:

1. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3. That the court erred in refusing an injunction enjoining the defendant from the use of the name Hunyady Matyas upon such bitter water.

4. That the court erred in refusing to grant an injunction enjoining the defendant from the use of the red and blue Hunyady
963 Matyas label when used in connection with the Seal Brand label of the defendant.

5. That the court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

6. That the court erred in holding that the trade mark or name Hunyadi of the complainant had been abandoned.

7. That the court erred in holding that the trade mark or name Hunyadi of the complainant had been abandoned by her or by any person or party acting for or representing or authorized to act for or represent her or her predecessor in interest, Andreas Saxlehner.

8. That the court erred in refusing to restrain the defendant from using the name "Hunyady" or "Hunyadi" as a prefix to some other name than "Janos," or to sell or advertise for sale its water as "Hunyadi" water, or from selling it under the said red and blue label bearing the name "Hunyady Matyas" in connection with the defendant's "Seal Brand" label pasted thereon, and in denying the injunction demanded by the complainant against such use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos."

9. That the court erred in holding that no damages for the sale of bottles of bitter water bearing said red and blue Hunyady Matyas label in connection with said "Seal Brand" label pasted thereon are to be recovered.

10. That the court erred in not granting the complainant the costs of the suit.

964 11. That the court erred in so far as it failed and refused to grant to the complainant the relief demanded by the bill, and each and every part thereof.

BRIESEN & KNAUTH,
Solicitors for Complainant and Appellant.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Eisner & Mendelson Company, defendant and appellee. Assignment of errors. Briesen & Knauth, solicitors for compl't and appellant, 229 Broadway, borough of Manhattan, New York. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
EISNER & MENDELSON COMPANY, Defendant and Appellee.

Bond for Damages and Costs.

Know all men by these presents that we, Percival Kuhne, residing at No. 22 West Fifty-sixth street, in the city of New York, borough of Manhattan, N. Y., and Max Hessberg, residing at No. 69 East Eighty-second street, in the city of New York, borough of

965 Manhattan, N. Y., are held and firmly bound unto the above-named Eisner & Mendelson Company in the sum of five hundred dollars ($500), to be paid to the said Eisner & Mendelson Company, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Emilie Saxlehner has prosecuted an appeal in the United States circuit court of appeals for the second circuit, to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Emilie Saxlehner shall prosecute her appeal to effect and answer all damages and costs, if she shall fail to make her said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PERCIVAL KUHNE. [SEAL.]
MAX HESSBERG. [SEAL.]

Sealed and delivered and taken and acknowledged this 10th day of August, 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Percival Kuhne and Max Hessberg, being severally duly sworn, do depose and say: that they are severally residents and householders within the city of New York, and that they are severally worth the sum of one thousand ($1,000) dollars over and above all their just debts and liabilities.

966

PERCIVAL KUHNE.
MAX HESSBERG.

Sworn to this 10th day of August, A. D. 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Eisner & Mendelson, defendant & appellee. Bond for damages and costs on appeal. Briesen & Knauth, solicitors for comp'l't & appellant, 229 Broadway, New York, N. Y. Approved as to form and sufficiency of sureties. N. Y., August 10, 1898. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
EISNER & MENDELSON COMPANY, Defendant and Appellee. } In Equity.

To the honorable the United States circuit court of appeals for the second circuit:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the 22d day of April, 1897, the above-named complainant filed her bill of complaint in the circuit court of the United States for the southern district of New York, against the above-named defendant and appellee, Eisner & Mendelson Company, in a suit in equity, alleging that said defendant had infringed the rights of the complainant to the exclusive use of the name "Hunyadi" as applied to bitter water, and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and praying for an accounting and payment to the complainant by the said defendant of the profits by it realized, and of the damages suffered by said complainant and appellant by reason of

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said infringement of the exclusive rights as above set forth, and also that the writs of subpœna and of injunction might be issued against said defendant, its officers, directors, managers, trustees, servants, agents, attorneys and workmen.

This complainant and appellant further shows that, pursuant to said prayer, a *subpœna ad respondendum* issued out of and under the seal of the circuit court, and was duly served upon the said defendant Eisner & Mendelson Company.

This complainant and appellant further shows that thereafter the said defendant Eisner & Mendelson Company appeared and answered said bill of complaint by filing its answer thereto, and amongst other things therein denied that the complainant had the exclusive right to the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and denied that it infringes the rights of the complainant. A general replication was filed thereto, and issue being thus joined, testimony was taken and such proceedings were had that on the 18th day of July, 1898, an interlocutory decree was entered in said circuit court, wherein it was in substance adjudged and decreed that the said defendant, Eisner & Mendelson Company, had infringed upon the rights of the complainant to the red and blue labels used on her "Hunyady Janos" bitter water, only by using
968 certain labels described in said interlocutory decree, being the "Hunyady Matyas," the "Hunyadi Laszlo" and "Hunyady Matyas No. 3" labels, but in which interlocutory decree it was adjudged and decreed that the said decree was not intended to restrain the defendant from using the name "Hunyadi" nor from selling its bitter water under its "Hunyady Matyas" label when the same had its "Seal Brand" label pasted thereon, and which interlocutory decree denied the injunction demanded by the complainant against the use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos," which said interlocutory decree is in these respects, as the complainant and appellant is advised, erroneous and ought to be reversed.

Wherefore, this appellant appeals from the said interlocutory decree of said circuit court of the United States, in so far as it adjudges and decrees that it is not intended by said decree to restrain the defendant from using the name "Hunyady" or "Hunyadi" as a prefix to some other name than "Janos," or to sell or advertise for sale its water as "Hunyadi" water, nor from selling it under the said red and blue label bearing the name "Hunyady Matyas" in connection with the defendant's "Seal Brand" label pasted thereon, and which denies the injunction demanded by the said complainant against such use of the name "Hunyadi" or "Hunyady" alone or as a prefix to some other name than "Janos;" and which adjudges and decrees that no damages for the sale of bottles of bitter water bearing said red and blue Hunyady Matyas label in connection with said "Seal Brand" label pasted thereon are to be recovered; and which adjudges and decrees that the question of costs be reserved until the entry of a final decree, to the United States circuit court of appeals for the second circuit, and respectfully prays that the de-

cree of said circuit court together with the bill of complaint,
969 answer, replication, pleadings, depositions, evidence, exhibits and proceedings in said cause may be sent to the United States circuit — of appeals for the second circuit without delay, and that the said United States circuit — of appeals for the second circuit will proceed to hear said cause anew, and that the said decree of the said circuit court in so far as is hereinbefore set forth may be reversed, with costs, and that the complainant may be given the relief prayed for in her bill of complaint, or such other decree made as the United States circuit court of appeals for the second circuit shall deem just.

A. v. BRIESEN, *Of Counsel.*

Appeal allowed August 10, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Eisner & Mendelson Co., defendant & appellee. Appeal. Briesen & Knauth, solicitors for compl't & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within appeal is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

970 By the Hon. E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the southern district of New York, within the second circuit.

To Eisner & Mendelson Company:

Whereas Emilie Saxlehner has lately appealed to the United States circuit court of appeals for the second circuit from a decree entered in the circuit court of the United States for the southern district of New York on the 18th day of July, 1898, and has filed the security required by law: You are therefore hereby cited to appear before the said United States circuit court of appeals for the second circuit at the city of New York on the 6th day of September next to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Eisner & Mendelson Company, defendant & appellee. Citation. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the

within citation is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

971 Circuit Court of the United States, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

Petition on Appeal.

To the honorable circuit court of appeals for the second circuit:

The bill of the above-named defendant respectfully shows:

The above-named defendant, The Eisner & Mendelson Company, conceiving itself aggrieved by the interlocutory decree entered in the above-entitled cause and filed in the office of the clerk of this court on the 18th day of July, 1898, does hereby appeal therefrom to the United States circuit court of appeals for the second circuit, and it prays that its appeal may be allowed, and a citation directed to the above-named complainant, commanding her to appear before the United States circuit court of appeals for the second circuit, to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the circuit court of appeals for the second circuit, and that said decree of the
972 circuit court may be reversed, or such decree made as to the circuit court of appeals may be meet.

CHARLES G. COE,
Solicitor for Defendant.

The foregoing appeal is allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Eisner & Mendelson Company, defendant. Petition on appeal. Charles G. Coe, solicitor for defendant, 5 Beekman street, N. Y. Service admitted this 11th day of August, 1898. Briesen & Knauth, sol'c't'rs for compl't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
EISNER & MENDELSON COMPANY, Defendant.

Assignment of Errors.

And now comes the defendant and says that in the record and proceedings of the said court in the above-entitled cause and the in-

terlocutory decree, made and entered herein on the 18th day
973 of July, 1898, there is manifest error, and for error the said defendant assigns the following:

First. The court erred in holding in and by the first section of said decree, as follows:

That since its organization in the year 1892, and before the commencement of this suit, the defendant herein has infringed upon the exclusive rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water by wrongfully and fraudulently selling and offering for sale in the southern district of New York and elsewhere in the United States, bitter water in bottles like those used by complainant for her Hunyadi Janos bitter water, the same being of a straight shape with a short neck and bearing labels in color, size, shape and general design so closely similar to complainant's said labels as to be calculated to deceive, the said labels being divided into three panels, the central panel being red or of a reddish brown, and bearing a portrait in a medallion, and the side panels being blue, one kind of said defendant's labels bearing the name "Hunyady Laszlo," another kind the name "Hunyady Matyas," and another the naime or description "Hunyady Matyas No. 3."

Second. The court erred in holding in and by the second section of said decree as follows:

That an injunction issue herein perpetually restraining and enjoining the defendant, The Eisner & Mendelson Company, its officers, servants, agents, and all persons in privity with it or them, from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant in bottles bearing labels like those heretofore used by said defendant and above described, and from selling or offering for sale any bitter water under labels
imitating complainant's Hunyadi labels in size, color, shape
974 and general arrangement so closely as to be calculated to deceive the public into the belief that they are complainant's labels.

Third. The court erred in holding in and by the third section of said decree as follows:

That the complainant recover from the defendant the damages which she has sustained by reason of the sale by defendant of bitter water bearing the red and blue labels described in the first paragraph of this decree and bearing the name or description "Hunyady Matyas," "Hunyadi Laszlo" and "Hunyady Matyas No. 3," respectively, since the organization of the defendant company in the year 1892; and from the sale of any bitter waters under any other red and blue label so similar to said complainant's labels as to be calculated to deceive; and that it be referred to John A. Shields, Esq., he having been agreed to by the parties and being conversant with accountings, which are special and sufficient reasons for his appointment, who is hereby appointed special master for the purpose of this suit, to ascertain and take and state and report to the court an account of all the gains, profits and advantages which the said defendant has received or which have arisen or accrued to said defendant since

the incorporation of said defendant company in the year 1892 from the use of said simulated red and blue labels upon the bitter water sold by it, and to ascertain and state the damages suffered by complainant by reason of such unlawful sale and offering for sale.

Fourth. The court erred in holding in and by the fourth section of said decree as follows:

And it is further ordered, adjudged and decreed that the complainant on such accounting have the right to cause the examination of the defendant, its officers, agents, servants and workmen, and such other witnesses as may be necessary to take said accounting, and also have the right on such accounting to the production of the books, vouchers, documents and other papers of which said
975 defendant, its officers, servants, agents or workmen, may be possessed before said master from time to time as such master may direct.

Fifth. The court erred in not holding that the complainant was disentitled to an exclusive right in and to labels divided into three panels, the central panel being red and bearing a portrait in a medallion, and the side panels being blue, used on the bottles of "Hunyadi Janos" bitter water sold by the complainant in the United States, and in not holding that said labels were generic and the common property of the mineral-water trade in the United States.

Sixth. The court erred in not holding that the complainant herein was disentitled to the perpetual injunction granted in and by the second section of the decree herein, and to the labels referred to and described in said second section of said decree, by reason of surrender, abandonment, acquiescence and estoppel.

Seventh. The court erred in not holding that the complainant herein was disentitled to the accounting awarded by the third and fourth sections of the decree herein, by reason of acquiescence, laches and neglect.

Eighth. The court erred in not holding that the copies of letters dated respectively January 24, 1888, and June 26, 1888, from the Apollinaris Company to Andreas Saxlehner, predecessor in business of the complainant herein, were admissible and competent as secondary evidence in this cause, and were properly introduced as secondary evidence on the part of the defendant herein.

Ninth. The court erred in granting a decree to the complainant.

976 Tenth. The court erred in not dismissing the bill of complaint herein.

Eleventh. The court erred in not holding that the complainant has no cause of action against this defendant.

Wherefore this defendant prays that the said judgment and decree of the said circuit court of the United States for the southern district of New York be reversed and that the said court be instructed to enter an order directing the dismissal of the said bill of complaint, with costs to this defendant.

Dated August 10, 1898.

CHARLES G. COE,
Solicitor for Defendant.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Eisner & Mendelson Company, defendant. Assignment of errors. Charles G. Coe, solicitor for defendant, 5 Beekman St., N. Y. U. S. circuit court. Filed Aug. 10, 1898. John A. Shields, clerk.

977 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Emilie Saxlehner:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 6th day of September, 1898, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Emilie Saxlehner is complainant and Eisner & Mendelson Company defendant, and you are required to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named this 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of these United States the one hundred and twenty-third.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant, *vs.* Eisner & Mendelson Company, defendant. Citation. Charles G. Coe, solicitor for defendant, 5 Beekman St, N. Y. Service admitted this 11th day of August, 1898. Briesen & Knauth, sol'c't's for compl't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

978 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
SIEGEL-COOPER COMPANY, Defendant and Appellee.
} In Equity.

In pursuance of and obedient to rule 11, formulated and adopted by the United States circuit court of appeals for the second circuit, the above-named complainant respectfully makes the following assignment of errors in the above-entitled case, to wit:

1. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3. That the court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

4. That the court erred in holding that the trade-mark or name Hunyadi of the complainant had been abandoned.

979 5. That the court erred in holding that the trade-mark or name Hunyadi of the complainant had been abandoned by her or by any person or party acting for, or representing or authorized to act for or represent her or her predecessor in interest, Andreas Saxlehner.

6. That the court erred in not granting the complainant the costs of the suit.

7. That the court erred in so far as it failed and refused to grant to the complainant the relief demanded by the bill and each and every part thereof.

BRIESEN & KNAUTH,
Solicitors for Complainant and Appellant.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Siegel-Cooper Co., defendant & appellee. Assignment of errors. Briesen & Knauth, solicitors for compl't & appellant, 229 Broadway, borough of Manhattan, New York. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

980 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMILIE SAXLEHNER, Complainant and Appellant, *vs.* SIEGEL-COOPER COMPANY, Defendant and Appellee.	Bond for Damages and Costs.

Know all men by these presents, *the* we, Percival Kuhne, residing at No. 22 West Fifty-sixth street, in the city of New York, borough of Manhattan, N. Y., and Max Hessberg, residing at No. 69 East Eighty-second street, in the city of New York, borough of Manhattan, N. Y., are held and firmly bound unto the above-named Siegel-Cooper Company in the sum of five hundred ($500) dollars, to be paid to the said Siegel-Cooper Company, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 10th day of August in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Emilie Saxlehner has prosecuted an appeal to the United States circuit court of appeals for the second circuit to reverse the decree rendered in the above-entitled suit, by

the judge of the circuit court of the United States for the southern district of New York:

Now therefore, the condition of this obligation is such, that
981 if the above-named Emilie Saxlehner shall prosecute her appeal to effect and answer all damages and costs, if she shall fail to make her said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PERCIVAL KUHNE. [SEAL.]
MAX HESSBERG. [SEAL.]

Sealed and delivered and taken and acknowledged this 10th day of August, 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Percival Kuhne and Max Hessberg, being severally duly sworn, do depose and say: That they are severally residents and householders within the city of New York, and that they are severally worth the sum of one thousand ($1,000) dollars over and above all their just debts and liabilities.

PERCIVAL KUHNE. [SEAL.]
MAX HESSBERG. [SEAL.]

Sworn to this 10th day of August, A. D. 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Siegel-Cooper Company, defendant & appellee. Bond for damages and costs on appeal. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, N. Y. Approved as to form and sufficiency of sureties. N. Y., August 10, 1898. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

982 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
SIEGEL-COOPER COMPANY, Defendant and Appellee. } In Equity.

To the honorable the United States circuit court of appeals for the second circuit:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the 12th day of April, 1897, the above-named complainant filed her bill of complaint in the circuit court of the United States for the southern district of New York against the above-

named defendant and appellee, Siegel-Cooper Company, in a suit in equity, alleging that said defendant had infringed the rights of the complainant to the exclusive use of the name "Hunyadi," as applied to bitter water, and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and praying for an accounting and payment to the complainant by the said defendant of the profits by it realized and of the damages suffered by said complainant and appellant by reason of said infringement of the exclusive rights as above set forth, and also that the writs of subpœna and of injunction might be issued against said defendant, its officers, directors, managers, trustees, servants, agents, attorneys, and workmen.

983 This complainant and appellant further shows that pursuant to said prayer a *subpœna ad respondendum* issued out of and under the seal of the circuit court, and was duly served upon the said defendant, Siegel-Cooper Company.

This complainant and appellant further shows that thereafter said defendant, Siegel-Cooper Company, appeared and answered said bill of complaint by filing its answer thereto, and amongst other things therein denied that the complainant had the exclusive right to the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and denied that it infringed the rights of the complainant. A general replication was filed thereto, and issue being thus joined testimony was taken and such proceedings were had that on the 18th day of July, 1898, a final decree was entered in said circuit court wherein it was adjudged and decreed that the complainant's bill of complaint be dismissed, with costs to the defendant, Siegel-Cooper Company, to be taxed, which said decree, is as the complainant and appellant is advised, erroneous, and ought to be reversed.

Wherefore this appellant appeals from the whole of said final decree of said circuit court of the United States to the United States circuit court of appeals for the second circuit, and respectfully prays that the decree of said circuit court together with the bill of complaint, answers, replication, pleadings, depositions, evidence, exhibits, and proceedings in said cause may be sent to the United States circuit court of appeals for the second circuit without delay, and that the said United States circuit court of appeals for the second circuit will proceed to hear said cause anew, and that the said decree of the said circuit court and every part thereof may be reversed, with costs, and that the complainant may be given the relief prayed

984 for in her bill of complaint, or such other decree made as the United States circuit court of appeals for the second circuit shall deem just.

A. v. BRIESEN, *Of Counsel.*

Appeal allowed August 10, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

Endorsed: United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Siegel-Cooper

Co., defendant & appellee. Appeal. Briesen & Knauth, solicitors for compl't & appellant, 229 Broadway, borough of Manhattan, New York. Due service of the within appeal is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U.S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

By the Hon. E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the southern district of New York, within the second circuit.

To Siegel-Cooper Company:

Whereas, Emilie Saxlehner has lately appealed to the United States circuit court of appeals, for the second circuit, from a decree entered in the circuit court of the United States for the southern district of New York, on the 18th day of July, 1898, and has filed the security required by law; you are therefore hereby cited to appear before the said United States circuit court of appeals, for the second circuit, at the city of New York, on the 6th day of September next, to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand at the city of New York, in the south-
985 ern district of New York, in the second circuit, the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Siegel-Cooper Company, defendant & appellee. Citation. Briesen & Knauth, solicitors for compl't & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
RUDOLPH GIES, Defendant and Appellee.
} In Equity.

In pursuance of and obedient to rule 11, formulated and adopted by the United States circuit court of appeals, for the second circuit, the above-named complainant respectfully makes the following assignment of errors in the above-entitled case, to wit:

1. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hun-
986 yadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3. That the court erred in refusing an injunction enjoining the defendant from the use of the name Hunyady Matyas upon such bitter water.

4. That the court erred in refusing to grant an injunction enjoining the defendant from the use of the red and blue Hunyady Matyas label when used in connection with the Seal Brand label of the Eisner & Mendelson Company.

5. That the court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

6. That the court erred in holding that the trade mark or name Hunyadi of the complainant had been abandoned.

7. That the court erred in holding that the trade mark or name Hunyadi of the complainant had been abandoned by her or by any person or party acting for or representing or authorized to act for or represent her, or her predecessor in interest, Andreas Saxlehner.

8. That the court erred in refusing to grant the perpetual injunction demanded by the complainant enjoining the defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells, either alone or as a prefix to some other name than "Janos," and from selling any bitter
987 water not coming from complainant's Hunyadi Janos wells as and for "Hunyadi" water.

9. That the court erred in refusing to grant the injunction demanded by the complainant enjoining the defendant from the sale of any bitter water not coming from her Hunyadi Janos wells, under the red and blue labels, bearing the name "Hunyady Matyas," and provided with the additional "Seal Brand" label of the Eisner & Mendelson Company.

10. That the court erred in not granting the complainant the costs of the suit.

11. That the court erred in so far as it failed and refused to grant to the complainant the relief demanded by the bill and each and every part thereof.

BRIESEN & KNAUTH,
Solicitors for Complainant and Appellant.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Rudolph Gies, defendant & appellee. Assignment of errors. Briesen & Knauth, solicitors for compl't & appellant, 229 Broadway, New York, borough of Manhattan. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

988 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
RUDOLPH GIES, Defendant and Appellee.
} Bond for Damages and Costs.

Know all men by these presents that we, Percival Kuhne, residing at No. 22 West Fifty-sixth street, in the city of New York, borough of Manhattan, N. Y., and Max Hessberg, residing at No. 69 East Eighty-second street, in the city of New York, N. Y., borough of Manhattan, are held and firmly bound unto the above-named Rudolph Gies in the sum of five hundred dollars ($500.00), to be paid to the said Rudolph Gies, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Emilie Saxlehner has prosecuted an appeal to the United States circuit court of appeals for the second circuit to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such,
989 that if the above-named Emilie Saxlehner shall prosecute her appeal to effect and answer all damages and costs, if she shall fail to make her said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PERCIVAL KUHNE. [SEAL.]
MAX HESSBERG. [SEAL.]

Sealed and delivered, and taken and acknowledged this 10th day of August, 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

Percival Kuhne and Max Hessberg, being severally duly sworn, do depose and say: that they severally are residents and householders within the city of New York, and that they are severally worth the sum of one thousand ($1,000) dollars over and above all their just debts and liabilities.

PERCIVAL KUHNE.
MAX HESSBERG.

Sworn to this 10th day of August, A. D. 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Rudolph Gies, defendant & appellee. Bond for damages and costs on appeal. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, New York, N. Y. Approved as to form and sufficiency of sureties. N. Y., August 10, 1898. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

990 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
RUDOLPH GIES, Defendant and Appellee. } In Equity.

To the honorable the United States circuit court of appeals for the second circuit:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the 15th day of May, 1897, the above-named complainant filed her bill of complaint in the circuit court of the United States for the southern district of New York against the above-named defendant and appellee, Rudolph Gies, in a suit in equity, alleging that said defendant had infringed the rights of the complainant to the exclusive use of the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water and praying for an accounting and payment to the complainant by the said defendant of the profits by him realized and of the damages suffered by said complainant and appellant by reason of said infringement of the exclusive rights as above set forth, and also that the writs of subpœna and of injunction might be issued against said defendant, his servants, agents, attorneys and workmen.

991 This complainant and appellant further shows that pursuant to said prayer a *subpœna ad respondendum* issued out of and under the seal of the circuit court, and was duly served upon the said defendant, Rudolph Gies.

This complainant and appellant further shows that thereafter the said defendant, Rudolph Gies, appeared, and answered said bill of complaint by filing his answer thereto, and amongst other things therein denied that the complainant had the exclusive right to the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and denied that he infringed the rights of the complainant. A general replication was filed thereto, and issue being thus joined, testimony was taken and such proceedings were had that on the 18th day of July, 1898, a final decree was entered in said circuit court, wherein it was in substance adjudged and decreed that the said defendant, Rudolph Gies, had infringed upon the rights of the complainant to the red and blue labels used on her "Hunyadi Janos"

bitter water by using certain labels described in said interlocutory decree, being the Hunyady Matyas labels, but in which final decree it was adjudged and decreed that the said decree was not intended to restrain the defendant from using the name "Hunyadi," nor from selling his bitter water under the "Hunyady Matyas" label when the same had the Seal Brand label of the Eisner & Mendelson Company pasted thereon, and which final decree denied the injunction demanded by the complainant against the use of the name "Hunyadi" or "Hunyady" alone or as a prefix to some other name than "Janos" which said final decree is in these respects, as the complainant and appellant is advised, erroneous, and ought to be reversed.

Wherefore this appellant appeals from the said final degree of said circuit court of the United States in so far as it denies the perpetual injunction demanded by the complainant, enjoining the
992 defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells, either alone or as a prefix to some other name than "Janos," and from selling any bitter water not coming from complainant's Hunyadi Janos wells as and for "Hudyadi" water, and which denies the injunction demanded by the complainant enjoining the defendant from the sale of any bitter water not coming from her said Hunyadi Janos wells, under the red and blue labels bearing the name "Hunyady Matyas," and provided with the additional "Seal Brand" label of the Eisner & Mendelson Company, and which adjudges and decrees that no accounting for damages or profits shall be had, and that no costs shall be recovered by complainant from defendant, to the United States circuit court of appeals for the second circuit, and respectfully prays that the decree of said circuit court, together with the bill of complaint, answer, replication, pleadings, depositions, evidence, exhibits, and proceedings in said cause may be sent to the United States circuit court of appeals for the second circuit without delay, and that the said United States circuit court of appeals for the second circuit will proceed to hear said cause anew, and that the said decree of the said circuit court in so far as is hereinabove set forth may be reversed with costs, and that the complainant and appellant may be given the relief prayed for in her bill of complaint, or such other decree made as the United States circuit court of appeals for the second circuit shall deem just.

A. v. BRIESEN, *Of Counsel.*

Appeal allowed August 10, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, vs. Ru-
993 dolph Gies, defendant & appellee. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within appeal is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. Filed Aug. 11, 1898. J. A. S., cl'k.

By the Hon. E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the southern district of New York, within the second circuit.

To Rudolph Gies:

Whereas Emilie Saxlehner has lately appealed to the United States circuit court of appeals for the second circuit from a decree entered in the circuit court of the United States for the southern district of New York on the 18th day of July, 1898, and has filed the security required by law, you are therefore hereby cited to appear before the said United States circuit court of appeals for the second circuit at the city of New York, on the 6th day of September next, to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand at the city of New York in the southern district of New York, in the second circuit, the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Rudolph Gies, defendant & appellee. Citation. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

994 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
LOUIS MARQUET, Defendant and Appellee. } In Equity.

In pursuance of and obedient to rule 11, formulated and adopted by the United States circuit court of appeals for the second circuit, the above-named complainant respectfully makes the following assignment of errors in the above-entitled case, to wit:

1. That the court erred in refusing to grant an injunction against the defendant, enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2. That the court erred in refusing to grant an injunction against the defendant, enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3. That the court erred in refusing an injunction enjoining the defendant from the use of the name Hunyady Matyas upon such bitter water.

4. That the court erred in refusing to grant an injunction enjoining the defendant from the use of the red and blue Hunyady
995 Matyas label when used in connection with the Seal Brand label of the Eisner & Mendelson Company.

5. That the court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

6. That the court erred in holding that the trade mark, or name, Hunyadi, of the complainant had been abandoned.

7. That the court erred in holding that the trade mark, or name, Hunyadi, of the complainant had been abandoned by her or by any person or party acting for or representing or authorized to act for or represent her or her predecessor in interest, Andreas Saxlehner.

8. That the court erred in refusing to grant the perpetual injunction demanded by the complainant, enjoining the defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells, either alone or as a prefix to some other name than "Janos," and from selling any bitter water not coming from complainant's Hunyadi Janos wells as and for "Hunyadi" water.

9. That the court erred in refusing to grant the injunction demanded by the complainant enjoining the defendant from the sale of any bitter water not coming from her Hunyadi Janos wells, under the red and blue labels, bearing the name "Hunyady Matyas," and provided with the additional "Seal Brand" label of the Eisner & Mendelson Company.

10. That the court erred in not granting the complainant the costs of the suit.

996 11. That the court erred in so far as it failed and refused to grant to the complainant the relief demanded by the bill and each and every part thereof.

BRIESEN & KNAUTH,
Solicitors for Claimant and Appellant.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Louis Marquet, defendant and appellee. Assignment of errors. Briesen & Knauth, solicitors for compl't and appellant, 229 Broadway, borough of Manhattan, New York. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
LOUIS MARQUET, Defendant and Appellee.
} Bond for Damages and Costs.

Know all men by these presents that we, Percival Kuhne, residing at No. 22 West Fifty-sixth street, in the city of New York, borough

of Manhattan, N. Y., and Max Hessberg, residing at No. 69
997 East Eighty-second street, New York, borough of Manhattan, N. Y., are held and firmly bound unto the above-named Louis Marquet in the sum of five hundred ($500) dollars, to be paid to the said Louis Marquet, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Emilie Saxlehner has prosecuted an appeal to the United States circuit court of appeals for the second circuit to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Emilie Saxlehner shall prosecute her appeal to effect and answer all damages and costs if she shall fail to make her said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PERCIVAL KUHNE. [SEAL.]
MAX HESSBERG. [SEAL.]

Sealed and delivered, and taken and acknowledged this 10th day of August, 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Percival Kuhne and Max Hessberg, being severally duly sworn, do depose and say: that they severally are residents and house-
998 holders within the city of New York, and that they are severally worth the sum of one thousand ($1,000) dollars over and above all their just debts and liabilities.

PERCIVAL KUHNE.
MAX HESSBERG.

Sworn to this 10th day of August, A. D. 1898, before me—

OTTO v. SCHRENK,
[SEAL.] *Notary Public, N. Y. County.*

(Endorsed:) U. S. circuit court, southern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Louis Marquet, defendant and appellee. Bond for damages and costs on appeal. Briesen & Knauth, solicitors for compl't and appellant, 229 Broadway, New York, N. Y. Approved as to form and sufficiency of sureties. N. Y., Aug. 10, 1898. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

999 Circuit Court of the United States for the Southern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
LOUIS MARQUET, Defendant and Appellee.
} In Equity.

To the honorable the United States circuit court of appeals for the second circuit:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the 28th day of May, 1897, the above-named complainant filed her bill of complaint in the circuit court of the United States for the southern district of New York against the above-named defendant and appellee, Louis Marquet, in a suit in equity, alleging that said defendant had infringed the rights of the complainant to the exclusive use of the name "Hunyadi" as applied to bitter water, and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and praying for an accounting and payment to the complainant by the said defendant of the profits by him realized and of the damages suffered by said complainant and appellant by reason of said infringement of the exclusive rights as above set forth, and also that the writs of subpœna and of injunction might be issued against said defendant, his servants, agents, attorneys and workmen.

This complainant and appellant further shows that pursuant to said prayer a *subpœna ad respondendum* issued out of and under the seal of the circuit court, and was duly served upon the said defendant, Louis Marquet.

1000 This complainant and appellant further shows that thereafter the said defendant, Louis Marquet, appeared, and answered said bill of complaint by filing his answer thereto, and amongst other things therein denied that the complainant had the exclusive right to the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and denied that he infringed the rights of the complainant. A general replication was filed thereto, and issue being thus joined, testimony was taken, and such proceedings were had that on the 18th day of July, 1898, a final decree was entered in said circuit court wherein it was in substance adjudged and decreed that the said defendant, Louis Marquet, had infringed upon the rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water, by using certain labels described in said interlocutory decree, being the Hunyadi Matyas labels, but in which final decree it was adjudged and decreed that the said decree was not intended to restrain the defendant from using the name "Hunyadi," nor from selling his bitter water under the "Hunyadi Matyas" label when the same had the "Seal Brand" label of the Eisner & Mendelson Company pasted thereon, and which final decree denied the injunction demanded by the complainant against the use of the name "Hunyadi" or "Hunyady" alone or as a prefix

to some other name than "Janos," which said final decree is in these respects, as the complainant and appellant is advised, erroneous, and ought to be reversed.

Wherefore, the appellant appeals from the said final decree of said circuit court of the United States in so far as it denies the perpetual injunction demanded by the complainant enjoining the defendant from the use of the name "Hunyadi" upon bitter water not coming from the complainant's Hunyadi Janos wells either alone or as a prefix to some other name than "Janos," and from selling
1001 any bitter water not coming from complainant's Hunyadi Janos wells as and for "Hunyadi" water; and which denies the injunction demanded by the complainant enjoining the defendant from the sale of any bitter water not coming from her said Hunyadi Janos wells, under the red and blue labels bearing the name "Hunyady Matyas" and provided with the additional "Seal Brand" label of the Eisner & Mendelson Company; and which adjudges and decrees that no accounting for damages or profits shall be had, and that no costs shall be recovered by complainant from defendant to the United States circuit court of appeals for the second circuit, and respectfully prays that the decree of said circuit court, together with the bill of complaint, answer, replication, pleadings, deposition, evidence, exhibits, and proceedings in said cause may be sent to the United States circuit court of appeals for the second circuit without delay, and that the said United States circuit court of appeals for the second circuit will proceed to hear said cause anew, and that the said decree of the said circuit court in so far as is hereinabove set forth may be reversed with costs, and that the complainant and appellant may be given the relief prayed for in her bill of complaint or such other decree made as the United States circuit court of appeals for the second circuit shall deem just.

A. v. BRIESEN, *Of Counsel.*

Appeal allowed August 10, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant & appellant, *vs.* Louis Marquet, defendant & appellee. Appeal. Briesen & Knauth, solicitors for complainant & appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within appeal is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

1002 By the Hon. E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the southern district of New York, within the second circuit.

To Louis Marquet:

Whereas, Emilie Saxlehner has lately appealed to the United States circuit court of appeals for the second circuit from a decree

entered in the circuit court of the United States for the southern district of New York on the 18th day of July, 1898, and has filed the security required by law. You are therefore hereby cited to appear before the said United States circuit court of appeals for the second circuit at the city of New York on the 6th day of September next, to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Louis Marquet, defendant and appellee. Citation. Briesen & Knauth, solicitors for complainant and appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 11th day of August, 1898. Charles G. Coe, solicitor for def't. U. S. circuit court. Filed Aug. 11, 1898. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second
1003 circuit, do hereby certify that the foregoing pages, numbered from one (1) to nine hundred and sixty-eight (968) inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cases of Emilie Saxlehner, complainant and appellee, *vs.* Eisner & Mendelson Company, defendant and appellant; Same, complainant and appellant, *vs.* Same, defendant and appellee; Same, complainant and appellant, *vs.* Siegel-Cooper Company, defendant and appellee; Same, complainant and appellant, *vs.* Rudolph Gies, defendant and appellee; Same, complainant and appellant, *vs.* Louis Marquet, defendant and appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York in the second circuit this sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-third.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

1004 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Nos. 86, 87, 88, and 89.

Submitted December 6, 1898; decided January 5, 1899.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
THE EISNER & MENDELSON COMPANY, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
THE SIEGEL-COOPER COMPANY, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
RUDOLPH GIES, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
LOUIS MARQUET, Defendant, Appellee.

Appeals from the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

Of these four suits the first is one against a wholesale dealer in imported Hungarian mineral waters which it offers for sale
1005 as Hunyadi Matyas, and as Hunyadi Laszlo, and puts up with wrappings and labels simulating complainant's. The other three suits are against retail dealers. The complainant sought to enjoin the use of the name Hunyadi with or without prefix, and also to enjoin the use of any label simulating the well-known red and blue label of Hunyadi Janos water, which water complainant owns and controls.

The circuit court at final hearing upon pleadings and proofs dismissed the bills as to the name Hunyadi. It sustained them as to the label, except that it held that the use by defendants of a certain additional label known as the "Seal label" sufficiently differentiated the goods offered for sale. The complainant has appealed in all four cases, and the defendant in the first case has appealed from so much of the decree as finds that the complainant is entitled to the exclusive use of the red and blue label, and that defendant should account for sales under that label prior to the introduction of the "Seal label."

LACOMBE, *Circuit Judge:*

The opinion of the judge who heard the cause in the circuit court is most careful and exhaustive. The voluminous facts are most fully rehearsed and an examination of the record shows that they are accurately stated; indeed we do not understand that the appellant controverts so much of the opinion. It would be a waste of time to rehearse all these facts here; the opinion of the circuit court is re-

ported in — Fed. Rep., —, and may be there consulted. We concur in the conclusion of that court that when these suits were begun in 1897 complainant was not entitled to the exclusive use in this country of the word "Hunyadi," which had before that time become a general name properly applicable to Hungarian bitter waters, so long as they were differentiated from each other by distinctive individual names, such as Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad, etc. This conclusion is reached, not upon any theory that the Apollinaris Company was the agent of complainant and her predecessors, but because the latter's acts and inaction alike make out a case of abandonment. In 1876 the original Saxlehner

1006 made a contract with the Apollinaris Company whereby he gave to them the exclusive sale of his Hunyadi Janos bitter water in the United States: that is he sold to them all they required and agreed to sell to no one else in the United States and not to sell for export there. Thereupon he devised the red and blue label for use on his bottles sold in the United States placing upon it a notice signed by himself that "imitation of this water, or of the label or of the capsule, will be the subject of legal proceedings at the instance of the Apollinaris Company." Down to 1886 all went well, and at that time the name Hunyadi (the short form used in common speech) was in fact the established trade-mark of the Janos water, and the red and blue label its distinctive trade dress. At that time a few cases of other bitter water "Matyas" and "Arpad" appeared and were offered for sale as Hunyadi Arpad and Hunyadi Matyas, whereupon the Apollinaris Company secured injunctions against their sale. These injunctions, however, were dissolved and the suits discontinued in 1888. From that time on competition steadily increased. As the circuit court found: "After the dissolution of these injunctions the Hunyadi Arpad and the Hunyadi Laszlo waters were sold in this country * * * and also, to a limited extent, the Hunyadi Bela water, all under the general name of Hunyadi, and with the imitation red and blue labels." In 1890 the Eisner & Mendelson Company began the sale of Hunyadi Matyas under labels closely simulating complainant's, and vigorously pressed the sale of it. The importations of competing waters into the United States from 1888 to 1895, all sold as Hunyadi water, whether Arpad, Matyas, Laszlo or what not, and nearly all offered under the red and blue labels aggregate as follows:

In 1889, 7,649 cases (50 bottles each).
" 1890, 10,789 "
" 1891, 9,610 "
" 1892, 11,899 "
" 1893, 8,156 "
" 1894, 12,570 "
" 1895, 6,244 "

1007 To check this appropriation of his trade-name and trade label in the United States Saxlehner for nearly nine years—from the dissolution of the injunctions in 1888 down to the begin-

ning of these suits in 1897—did absolutely nothing. The Apollinaris Company whom he had over his signature proclaimed to the world as the suppressor of infringements did take action, but not in the line of maintaining the trade name. In 1889 and again in 1890 that company announced that it had adopted an additional trade-mark of selection (a red diamond) which was to distinguish the Hungarian aperient water sold by it, and that it did so for the reason that numerous aperient waters are offered to the public under names of which the word "Hunyadi" forms a part. In 1893 the Apollinaris Company issued a further circular in which it stated that: "The word Hunyadi having become a general name for Hungarian bitter waters, good, bad, and indifferent, the Apollinaris Company has affixed to the bottles of Hunyadi Janos water the red diamond," etc., etc.

In view of these facts, of the continued and increasing appropriation by competitors of his label and of his trade name (as a general designation), can a complainant who has for nine years done nothing towards maintaining or even asserting his original rights now be heard to suppress the competition which his supineness has allowed and indeed invited and encouraged to grow up? We think not. The case at bar seems to be one of those exceptional ones referred to in Menendez *vs.* Holt (128 U. S., 514), where delay or acquiescence has been continued so long and under such circumstances as to defeat the right itself. Nor is the situation changed by Saxlehner's absence abroad. If he had chosen to sell his own goods in this country thus becoming a dealer here familiar with the conditions of the business, he must inevitably have acquired the knowledge as to appropriation of the name and label, which the Apollinaris Company acquired, and, if, with such knowledge, he went on year after year without even giving notice of dissent and non-acquiescence,
there would surely come some time when he must be held to
1008 have abandoned his exclusive claims. And he cannot avoid
the imputation of such knowledge, merely by selling his entire importation to a single person, leaving to that person the distribution of the goods to the trade here. If he wished to hold on to his trade name and trade label in this country he should either have taken steps to advise himself as to the situation, or should have seen to it that his selected vendee who shared with him in his monopoly took proper action to maintain his rights.

The circuit court reached the conclusion that although the trade name Hunyadi had thus been abandoned to the public the same was not true of the red and blue label, founding the distinction on the "positive action" of the Apollinaris Company in making the declarations above quoted. Inasmuch as the company was not Saxlehner's agent he cannot fairly be held to be bound by any "positive action" of theirs of which he was not advised; but, as above stated, he is chargeable with their failure to act as much as with his own, and must be held to have abandoned all exclusive claim to the use in the United States either of the trade name or the trade label.

The decree of the circuit court is affirmed as to the name Hun-

yadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

Antonio Knauth and Joseph H. Choate for the complainant.
Edmund Wetmore for the defendants.

1009 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 24th day of January, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
THE EISNER & MENDELSON COMPANY, Defendant, Appellant.

Appeals from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

1010 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Eisner & Mendelson Co. Order for mandate.

1011 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 24th day of January, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
SIEGEL-COOPER COMPANY, Defendant, Appellee.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

1012 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Siegel-Cooper Co. Order for mandate.

1013 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 24th day of January, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
RUDOLPH GIES, Defendant, Appellee.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

1014 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Rudolph Gies. Order for mandate.

1015 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 24th day of January, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
LOUIS MARQUET, Defendant, Appellee.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

1016 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Louis Marquet. Order for mandate.

1017 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Petitioner,
vs.
EISNER & MENDELSON COMPANY.

SAME
vs.
SIEGEL-COOPER COMPANY.

SAME
vs.
RUDOLPH GIES

SAME
vs.
LOUIS MARQUET.

SIRS: Take notice that on Tuesday, January 24, 1899, at
1018 the opening of the court on that day, at 10.30 a. m. or as soon therafter as counsel can be heard, we shall move this court for a rehearing of the above-entitled suits, and that in support of such motion a petition will be presented to this court, a copy of which is herewith served upon you.

Jan'y 17, 1899.

Yours, &c.,

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Att'ys and of Counsel for Petitionr.

To Edmund Wetmore, Esq., Charles G. Coe, Esq., of counsel for def'ts.

1019 United States Circuit Court of Appeals, Second Circuit.

EMILIE SAXLEHNER, Complainant, Appellant, *vs.* EISNER & MENDELSON COMPANY, Defendant, Appellant.	
SAME *vs.* SIEGEL-COOPER COMPANY.	Petition for Rehearing.
SAME *vs.* RUDOLPH GIES.	
SAME *vs.* LOUIS MARQUET.	

To the honorable the judges of the said court:

Your petitioner, Emilie Saxlehner, complainant and appellant, hereby respectfully represents to this court as follows:

First. That she is advised and believes this court has been inadvertently led into error concerning the law which is applicable
1020 to these suits, in that it did not regard the importance, upon the questions therein involved, of the treaty or convention between the United States of America and the Austro-Hungarian Empire, which was proclaimed on June 1, 1872, and which was in full force and effect at the time these suits were brought. This treaty or convention is in words as follows, to wit:

"Convention between the United States and the Austro-Hungarian Empire, November 25, 1871; proclaimed June 1, 1872 (17 Statutes at Large, 917).

"Article I.

"Every reproduction of trade-marks, which, in the countries or territories of the one of the contracting parties, are affixed to certain merchandise to prove its origin and quality, is forbidden in the countries or territories of the other of the contracting parties, and shall give to the injured party ground for such action or proceedings to prevent such reproduction, and to recover damages for the same, as may be authorized by the laws of the country in which the counterfeit is proven, just as if the plaintiff were a citizen of that country.

"Exclusive right to use a trade-mark for the benefit of citizens of the United States in the Austro-Hungarian Empire, or of citizens of the Austro-Hungarian monarchy in the territory of the United States, cannot exist for a longer period than that fixed by the law of the country for its own citizens. If the trade-mark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties.

"Article II.

"If the owners of trade-marks, residing in the countries or territories of the one of the contracting parties, wish to secure their rights in the countries or territories of the other of the contracting parties, they must deposit duplicate copies of those marks in
1021 the Patent Office at Washington, and in the chambers of commerce and trade in Vienna and Pesth."

Second. It is in evidence that the petitioner duly registered her trade-mark "Hunyadi," together with a description of the red and blue label upon which it was used, in the United States Patent Office in the year 1887, and that she likewise registered the red and blue label in the chambers of commerce and industry at Budapest in 1890 (under the statute passed in that year), and the name "Hunyadi" in the year 1895 (under the statute of 1895). Being a subject of the King of Hungary, and not of the Emperor of Austria, she had no occasion, nor does there seem to be any provision, for a registration of her trade-mark in Vienna.

Third. It is clearly proven in these suits that prior to the year 1890 your petitioner had no relief in Hungary against persons using colorable imitations of her label, and that until the year 1895 she had no relief there against any persons using the name "Hunyadi" (alone or in connection with other names) for fraudulent purposes on bitter waters. Immediately after the passing of the statute of 1890 she commenced suits in Hungary against the infringers of her label and brought them to successful termination in the years 1894 to 1895. Immediately after the passing of the act of 1895 again she commenced suits in Hungary against the same persons for unlawfully using the name "Hunyadi," and obtained final decrees in her favor in the month of October, 1896. During that same month she gave notice to the infringers of her name and label in the United States, instituted a number of actions against druggists to collect proof of fraudulent passing off, and a few months later, in the commencement of 1897, brought the present suits.

Fourth. Previous to the termination of those suits in Hun-
1022 gary the treaty above cited was a serious obstacle to her right to sue in the United States. The defendants in those cases might well claim that under the treaty she was not authorized to enforce any trade-mark rights which were not recognized in the country of its origin. Therefore she could not be fairly charged with laches until after the time that her rights were recognized and protected in her own country.

Fifth. After such establishment of her rights in Hungary the treaty above cited clearly provides that every reproduction of petitioner's trade-mark and label is now likewise forbidden in the United States, and shall give to petitioner ground for such relief as is usually given in this country in such cases.

Wherefore, your petitioner respectfully asks that no mandate issue from this court under its opinion of January 7, 1899, and that a rehearing be granted and an order entered reversing the decision

below and giving appellant the relief prayed for in her bill of complaint in each of the above-entitled suits.

And your petitioner will ever pray, &c.

EMILIE SAXLEHNER,
By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN, AND
ANTONIO KNAUTH, *Her Counsel.*

We hereby certify that in our opinion the foregoing petition is well founded in point of law and in point of fact, and is not presented for delay.

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN, AND
ANTONIO KNAUTH,
Counsel for Complainant, Appellant.

Endorsed: A copy of the within papers were this 17 day of Jan'y, 1899, delivered at the office of Wetmore & Jenner, counsel for def'ts.

1023 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER
against
EISNER & MENDELSON CO.

SAME
vs.
SIEGEL-COOPER CO.

SAME
vs.
LOUIS MARQUET.

SAME
vs.
RUDOLPH GIES.

} Affidavit of Service.

STATE OF NEW YORK, }
County of New York, } *ss:*

Alfred T. Hutchinson, of the city of Newark, N. J., being duly sworn, says that he is eighteen years of age and upwards, and that on the seventeenth day of January, in the year one thousand eight hundred and ninety-nine, he personally served the annexed petition for rehearing and notice on Charles G. Coe, counsel for defendants in the above-entitled action, at 5 and 7 Beekman street, in the city of New York, N. Y., borough of Manhattan, by delivering to and leaving with a clerk in charge of said office during the temporary absence of said Charles G. Coe from said office a true copy thereof.

ALFRED T. HUTCHINSON.

Sworn to before me this 17 day of January, 1899.

OTTO v. SCHRENTZ,
[SEAL.] *Notary Public, N. Y. County.*

1024 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Nos. 85, 86, 87, 88, and 89.

Motion submitted January 24, 1899; decided January 25, 1899.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NEILSEN, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
THE EISNER & MENDELSON COMPANY, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
THE SIEGEL-COOPER COMPANY, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
RUDOLPH GIES, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
LOUIS MARQUET, Defendant, Appellee.

Appeals from the circuit court of the United States for the eastern and southern districts of New York.

Before Judges Wallace and Lacombe.

Motion for Reargument.

Per Curiam:

We are unable to assent to the proposition that the provisions of the treaty are to be construed so as to hold that when the public in this country has acquired, through the owner's laches, the right to use a trade name and a trade-mark, such right is abrogated, whenever by the operation of some subsequent Hungarian law the trade name and trade-mark is secured to him in Hungary. For that reason petition for reargument is denied.

1025 U. S. Circuit Court of Appeals, Second Circuit.

EMILIE SAXLEHNER
vs.
EISNER & MENDELSON COMPANY.

SAME
vs.
RUDOLPH GIES.

SAME
vs.
LOUIS MARQUET.

SAME
vs.
SIEGEL-COOPER COMPANY.

} In Equity.

A petition for a rehearing herein having been filed by the complainant, appellant, Emilie Saxlehner, together with a brief in support thereof, and the same having been duly considered, it is hereby—

Ordered that said petition be, and the same hereby is, denied.

W. J. W.
E. H. L.

1026 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 1025, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cases of Emilie Saxlehner *vs.* Eisner & Mendelson Company; Same *vs.* Siegel-Cooper Company; Same *vs.* Louis Marquet, and Same *vs.* Rudolph Gies, as the same remain- of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 11th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 2, 11, '99.]

1026½ [Endorsed:] Case No. 17,297. U. S. C. C. of appeals, 2nd circuit. Term No., 712. Emilie Saxlehner, petitioner, *vs.* Eisner & Mendelson Co. Case No. 17,298. Term No., 713. Emilie

Saxlehner, petitioner, *vs.* Siegel-Cooper Company. Case No. 17,299. Term No., 714. Emilie Saxlehner, petitioner, — Rudolph Gies. Case No. 17,300. Term No., 715. Emilie Saxlehner, petitioner, *vs.* Louis Marquet. Filed February 17, 1899.

1027 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Emilie Saxlehner is appellant and The Eisner & Mendelson Company is appellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

1028 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

1029 [Endorsed:] Supreme Court of the United States. No. 712. October term, 1898. Emilie Saxlehner *vs.* The Eisner & Mendelson Company. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Mar. 29, 1899. William Parkin, clerk.

1030 United States Circuit Court of Appeals for the Second Circuit

EMILIE SAXLEHNER, Appellant and Appellee,
vs.
EISNER & MENDELSON COMPANY, Appellee and Appellant.

A writ of certiorari having been issued by the Supreme Court of the United States in the above-entitled cause, directed to the circuit court of appeals for the second circuit, it is stipulated between the solicitors and counsel for the respective parties to said suit that the certified transcript of the record and proceedings therein, heretofore filed in the Supreme Court of the United States with the petition

for writ of certiorari in said cause on February 16, 1899, be the return of the clerk of this court to said writ of certiorari.

Dated New York, March 9, 1899.

BRIESEN & KNAUTH,
Solicitors & Counsel for E. Saxlehner.
CHARLES G. COE,
Solicitor & Counsel for Eisner & Mendelson Company.

A true copy.

——— ———, *Clerk.*

1031 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, March 29th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 3, 29. W. P.]

1032 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Eisner & Mendelson Company. Return to writ of certiorari.

1033 [Endorsed:] File No., 17,297. Supreme Court U. S., October term, 1898. Term No., 712. Emilie Saxlehner, petitioner, *vs.* Eisner & Mendelson Co. Writ of certiorari & return. Office Supreme Court U. S. Filed Apr. 1, 1899. James H. McKenney, clerk.

1034 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Emilie Saxlehner is appellant and Siegel-Cooper Company is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

1035 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings

in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand eight hundred and ninety nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

1036 [Endorsed:] Supreme Court of the United States. No. 713. October term, 1898. Emilie Saxlehner *vs.* Siegel-Cooper Company. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Mar. 29, 1899. William Parkin, clerk.

1037 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Appellant,
vs.
SIEGEL-COOPER COMPANY, Appellee.

A writ of certiorari having been issued by the Supreme Court of the United States in the above-entitled cause, directed to the circuit court of appeals for the second circuit, it is stipulated between the solicitors and counsel for the respective parties to said suit that the certified transcript of the record and proceedings therein heretofore filed in the Supreme Court of the United States, with the petition for writ of certiorari in said cause, on February 16, 1899, be the return of the clerk of this court to said writ of certiorari.

Dated New York, March 9, 1899.

BRIESEN & KNAUTH,
Solicitors & Counsel for Emilie Saxlehner.
CHARLES G. COE,
Solicitor & Counsel for Siegel-Cooper Co.

1038 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, March 29th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 3, 29. W. P.]

1039 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Siegel-Cooper Company. Return to writ of certiorari.

1040 [Endorsed:] File No., 17,298. Supreme Court U. S., October term, 1898. Term No., 713. Emilie Saxlehner, peti-

tioner, *vs.* Siegel-Cooper Co. Writ of certiorari & return. Office Supreme Court U. S. Filed Apr. 1, 1899. James H. McKenney, clerk.

1041 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Emilie Saxlehner is appellant and Rudolph Gies is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and
1042 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

1043 [Endorsed:] Supreme Court of the United States. No. 714. October term, 1898. Emilie Saxlehner *vs.* Rudolph Gies. Writ of certiorari. United States circuit court of appeals. second circuit. Filed Mar. 29, 1899. William Parkin, clerk.

1044 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Appellant,
vs.
RUDOLPH GIES, Appellee.

A writ of certiorari having been issued by the Supreme Court of the United States in the above-entitled cause, directed to the circuit court of appeals for the second circuit, it is stipulated between the solicitors and counsel for the respective parties to said suit that the certified transcript of the record and proceedings therein, heretofore filed in the Supreme Court of the United States with the petition for writ of certiorari in said cause on February 16, 1899, be the return of the clerk of this court to said writ of certiorari.

Dated New York, March 9, 1899.

BRIESEN & KNAUTH,
Solicitors & Counsel for E. Saxlehner.
CHARLES G. COE,
Solicitor & Counsel for Rudolph Gies.

1045 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, March 29th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 3, 29. W. P.]

1046 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Rudolph Gies. (Copy.) Return to writ of certiorari.

1047 [Endorsed:] File No., 17,299. Supreme Court U. S., October term, 1898. Term No., 714. Emilie Saxlehner, petitioner, *vs.* Rudolph Gies. Writ of certiorari & return. Office Supreme Court U. S. Filed Apr. 1, 1899. James H. McKenney, clerk.

1048 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Emilie Saxlehner is appellant and Louis Marquet is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and

1049 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

1050 [Endorsed:] Supreme Court of the United States. No. 715. October term, 1898. Emilie Saxlehner *vs.* Louis Marquet. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Mar. 29, 1899. William Parkin, clerk.

1051 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Appellant,
vs.
LOUIS MARQUET, Appellee.

A writ of certiorari having been issued by the Supreme Court of the United States in the above-entitled cause, directed to the circuit court of appeals for the second circuit, it is stipulated between the solicitors and counsel for the respective parties to said suit that the certified transcript of the record and proceedings therein, heretofore filed in the Supreme Court of the United States with the petition for writ of certiorari in said cause on February 16, 1899, be the return of the clerk of this court to said writ of certiorari.

Dated New York, March 9, 1899.

BRIESEN & KNAUTH,
Solicitors & Counsel for E. Saxlehner.
CHARLES G. COE,
Solicitor and Counsel for Louis Marquet.

1052 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, March 29th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 3, 29. W. P.]

1053 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Louis Marquet. Return to writ of certiorari.

1054 [Endorsed:] File No., 17,300. Supreme Court U. S., October term, 1898. Term No., 715. Emilie Saxlehner, petitioner, *vs.* Louis Marquet. Writ of certiorari & return. Office Supreme Court U. S. Filed Apr. 1, 1899. James H. McKenney, clerk.

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12

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. XXX 1899 29

EMILIE SAXLEHNER,
Petitioner,

vs.

EISNER & MENDELSON CO.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

1

EMILIE SAXLEHNER, Petitioner, vs. EISNER & MENDELSON COMPANY.	October Term, 1898. No.

2

Notice of Motion.

TO EISNER & MENDELSON COMPANY, THE ABOVE NAMED DEFENDANT:

Please take notice that on Monday, February 20, 1899, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

3

Respectfully,

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February 1899.

Eisner & Mendelson Co
Defendant.
by Charles G. Coe
Edmund Katzenstein
its attorneys & Counsel

SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER,
Petitioner,

vs.

EISNER & MENDELSON COMPANY.

October Term, 1898.

No.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and counsel, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals, within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and appellee and said Eisner & Mendelson Company was appellant and appellee.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi," and a red and blue label used in connection therewith upon complainant's bitter-water, called "Hunyadi Janos." Your petitioner's right to said trade-mark and label has been held forfeited

by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this 11th day of February 1899.

Eisner & Mendelson Co
Defendant.
by Charles G. Cox
Edmund Wetmore
its attorneys & Counsel

10 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

No.

EMILIE SAXLEHNER, Petitioner,
In re petition for a writ of *certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit, to certify to the Supreme Court for review and determination the
11 case of EMILIE SAXLEHNER, Complainant and Appellant,

VS.

EISNER & MENDELSON COMPANY,
Defendant and Appellant.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

12 The petition of Emilie Saxlehner respectfully shows:

FIRST.—That petitioner is a subject of the King of Hungary, and resides at Budapest, in the Kingdom of Hungary, and the defendant Eisner & Mendelson Company, is a corporation incorporated under the laws of the State of West Virginia, and a citizen of that State.

SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there

is involved in said cause the validity or invalidity of 13
petitioner's trade-mark "Hunyadi" for bitter water, and that of the label used by her, upon which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's trade-mark rights in the name "Hunyadi," and also from selling bitter waters bearing colorable and fraudulent imitations of the red and blue label used by petitioner in connection with said name "Hunyadi" on her bitter water called "Hunyadi Janos." 14
That the evidence in this case was by stipulation taken in one record with the similar cases of your petitioner against the Siegel-Cooper Company, Rudolph Gies and Louis Marquet, in which similar petitions are simultaneously presented to this Court.

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and label may be shortly summarized as follows:

Andreas Saxlehner, your petitioner's husband and predecessor in business, now deceased, adopted the arbitrary and fanciful name "Hunyadi Janos" for the bitter water of his springs at Budapest, Hun- 15
gary, more than thirty years ago, and the same has since then been continuously used by him and your petitioner as a trade-mark in all civilized countries. The water was introduced into the United States about 1870, and was sold here under a red and white label until the year 1876, and from 1876 to March, 1896, under a red and blue label substantially like the label hereto attached and marked "Exhibit A," and since March, 1896, under the label hereto attached and marked "Exhibit B." From the commencement of the business in this country the water obtained the colloquial and short

16 appellation "Hunyadi Water." Complainant's business amounts to about six million bottles per year of such water, which she sells to all countries in the world from Hungary.

In the year 1876 Andreas Saxlehner made a contract with the Apollinaris Company, Limited, by which he agreed not to sell directly to this country for a period of years, and that he would sell to that company only the "Hunyadi Janos" water for sale in this and other transmarine countries. This contract has been in force until March, 1896.

No noticeable infringements occurred until 1886, when the Apollinaris Company stopped by injunction an importation of a "Hunyadi Matyas" water
17 imported under a red and white label, and of a "Hunyadi Arpad" water imported under a red and blue label. These injunctions were dissolved in 1888 without a trial on the merits. Saxlehner was not a party to these suits and no competent evidence was offered that he had any knowledge of the same. After 1888, several Hungarian bitter waters were imported bearing red and blue labels and the name "Hunyadi" in connection with some other name, every one of these labels being made in close imitation of Saxlehner's blue and red label. All these were sold in this country as "Hunyadi Water," with exception of those which had not the name "Hunyadi" on the label, such as "Victoria" and
18 "Georgy," which were not sold as "Hunyadi" water. Other Hungarian bitter waters have continued to be imported under their own labels and names and these were not called "Hunyadi."

Until 1890 Saxlehner enjoyed no protection for the name "Hunyadi" or for *colorable* imitations of his labels in Hungary, by reason of a lack of statutes upon the subject. He had repeatedly endeavored to obtain relief in Hungary against the imitators of his name and label, but without success, although he was by many years the first to adopt and use the name and label. He died in 1889. In 1890 a statute was passed in Hungary enabling the

petitioner to sue imitators of her label, and in 1891 19
she commenced a series of litigations against all imitators of her label in Hungary, which were numerous. These litigations came to a successful termination in 1894 and 1895, when she succeeded in having all the imitating labels canceled from the Hungarian Register of Trade-Marks. The statute of 1890, however, did not make provision for the registration of mere words or names as trade-marks, and petitioner, therefore, had no relief in court in Hungary against the use of the name "Hunyadi" alone or in connection with other words, such as "Matyas," "Arpad" or "Lajos" until 1895, when another remedial statute was passed in Hungary permitting such relief. She immediately instituted new suits 20
against the same persons against whom she had obtained the decrees canceling the imitating labels, and in October, 1896, obtained final decrees establishing her exclusive right to the name "Hunyadi" in Hungary for bitter waters and canceling all the opposing trade-marks employing that name in some connection or other. All these opposing marks were found to have been fraudulently contrived. Among the parties sued by petitioner in Hungary in 1891
and against whom she obtained the relief described above in the years 1894 and 1896 were the firm of Mattoni & Wille, who furnished the "Hunyady Matyas" water to the defendant, and also another concern which furnished the "Hunyadi Laszlo" 21
water. The defendant had knowledge of these Hungarian suits at least as early as 1893.

In March, 1896, when the contract of the Apollinaris Company terminated, petitioner also sued the Apollinaris Company in the Court of Chancery of England for an illegal use of the name "Hunyadi" upon a bitter water then introduced by that company under the name of a "New Hunyadi," and in the early part of the year 1897 obtained a final decree enjoining it from the use of the name "Hunyadi." The Apollinaris Company has since then not contested petitioner's exclusive right to the name

22 "Hunyadi" in this country. Petitioner also brought in 1896 a suit against Graef & Co., agents of the Apollinaris Company in this country, which was settled by a voluntary abandonment of the use of the name "New Hunyadi" by the agents of the Apollinaris Company in this country.

In October, 1896, when her rights had been finally recognized and established in Hungary, petitioner gave notice to all infringers in the United States, including the defendant, to stop further infringements, and a few months thereafter brought the present suit.

In 1887 Andreas Saxlehner had registered the name "Hunyadi" as his trade-mark in the Patent
23 Office of the United States in connection with the red and blue label, and this label and name were likewise registered by the petitioner in Budapest in 1890, and the name "Hunyadi" alone without any label in 1895, under the Hungarian statutes above referred to and in accordance with the provisions of the treaty between the United States of America and Austro-Hungary of June 1, 1872.

FIFTH.—The following facts relating to defendant's infringement were found by the Court to be clearly proved:

Defendant first imported in 1889 and 1890 a con-
24 signment of water from Mattoni & Wille in Budapest, called "Royal Hungarian Bitter Water," with a red and white label, under a contract of twenty years. In 1890 defendant gave up this contract and took a lease from Mattoni & Wille, of the so-called "Hunyady Matyas Spring No. 2." "The reason "which induced Eisner to make this lease was his "desire to control the American label, so that "neither Mattoni & Wille nor European purchasers "could interfere with the American trade. A new "label was therefore forthwith devised by Eisner, "which was a reddish brown and blue label, and is "described in the complaint, containing the name

" 'Hunyady Matyas Budai Keserüviz,' and a medal- 25
" lion portrait of King Stephen in the centre of the
" red division. *He intentionally simulated the Sax-*
" *lehner United States label for the purpose of ob-*
" *taining, by means of the simulation, a part of the*
" *good will which the Janos water had gained. This*
" *'Matyas Spring No. 2' was not the original*
" *Matyas spring in regard to which Markus had his*
" *litigation in* 1873, *but was another spring, called*
" *the 'Franz Deak' spring, which Mattoni & Wille*
" *bought in* 1876 *from Michael Ivanyi and wife, and*
" *was the spring registered in* 1877 *under the name*
" *'Deak.'*" This water was "*extensively advertised*
" *as a 'Hunyadi water,' and being sold below the*
" *market price of the Janos water, has been largely* 26
" *bought, especially by druggists who receive the*
" *custom of the class which desires economy.*"

A copy of defendant's Hunyady Matyas label is hereto attached and marked "Exhibit C," and a copy of its "Hunyadi Laszlo" is also attached and marked "Exhibit D."

SIXTH.—The undisputed evidence further showed that defendant had advertised its "Hunyady Matyas" water as the "original Hunyadi Water," in connection with pretended testimonials of physicians dated many years previous to the discovery of the first "Hunyady Matyas" spring, altered so as 27
to read by the name for the Hunyady Matyas Spring, and that the water which it first imported under the name of "Mattoni's Royal Hungarian Bitter-water," with the red and white label, was the same water which it thereafter sold under the red and blue label, with the name "Hunyady Matyas" thereon; also that by reason of the name "Hunyady" on this label, defendant's water was commonly sold as "Hunyadi Water" in this country.

SEVENTH.—The undisputed evidence further showed that to physicians and the consuming public

the name "Hunyadi ~~Janos~~" on bitter-water means in the United States still Saxlehner's "Hunyadi Janos" water, and such name had not become generic for Hungarian bitter waters, other such waters continuing to be imported and sold under other labels and names, and not being called "Hunyadi."

EIGHTH.—There was no substantial conflict about the facts in the case, which were stated carefully and in detail in the opinion of Shipman, Judge, who decided the case at the Circuit Court, and the Circuit Court of Appeals found the facts to be substantially uncontroverted. A copy of the opinion of the Circuit Court is hereto attached and marked "Exhibit E," and a copy of the opinion of the Circuit Court of Appeals is likewise attached marked "Exhibit F."

NINTH.—The Circuit Court held that the charge of laches against the complainant or her predecessor was not adequately sustained, but that by certain publications of the Apollinaris Company, the right to the name "Hunyadi" had been publicly abandoned by that company, which abandonment was binding upon petitioner, although the company was not her agent. It also held that the other dealers could not call their water "Hunyadi," but they could use the word as a prefix. It denied an injunction on the name "Hunyadi" on the ground of such "positive assertions," but granted an injunction against the red and blue labels, excepting from such injunction the "Hunyady Matyas" label when the same was accompanied by the small seal-brand label appearing on "Exhibit C."

The Circuit Court of Appeals decided that petitioner was not bound by said "positive assertions," but was guilty of laches during a period of nine years, denied her all relief upon the name and the label, and dismissed the bill of complaint, with costs.

TENTH.--A petition for a rehearing was thereupon filed by petitioner in the Circuit Court of Appeals, and the Court's attention called to the treaty above referred to between the United States of America and Austro-Hungary, but such petition was denied, and a copy of the opinion *per curiam* rendered thereon is hereto attached and marked "Exhibit G." 31

ELEVENTH.—The decision of the Circuit Court of Appeals was rendered solely upon the supposed authority of the case of *Menendez* vs. *Holt*, 128 *U. S.*, 514, which your petitioner respectfully submits, does not sustain the reasoning of the Court upon the facts which were clearly proved; and that said decision is opposed to the law which this Honorable Court has laid down in the case of *McLean* vs. *Fleming*, 96 *U. S.*, 245, and is also subversive of the rights guaranteed to petitioner by said treaty between the United States of America and Austro-Hungary. 32

TWELFTH.—That the United States Circuit Court of Appeals committed a grievous error in overlooking or disregarding the fact that until the year 1895 your petitioner was unable to restrain in Hungary the use of the name "Hunyadi" in connection with such other words as "Matyas," "Lajos," "Laszlo," &c.; that consequently in the United States her right to restrain the use of that name upon those waters imported from Hungary was doubtful; that petitioner did everything in her power to establish her rights in Hungary when statutory provisions made this possible, and continued these efforts from 1891 until 1896, when she finally succeeded, and that these litigations in Hungary were directed against the very persons who furnished the water to defendant in this country. 33

THIRTEENTH.—That if the decision of the Circuit Court of Appeals is to be the law of the land anybody can, with impunity, sell water from any source

whatever, and of any kind or quality whatever under an imitation of your petitioner's red and blue label and with the name "Hunyadi" thereon, either alone or as a prefix to some other name; that public health is endangered thereby, and the welfare of the community demands that such gross imposition upon physicians and patients alike be stopped by injunction.

FOURTEENTH.—That petitioner has never by words or by deed abandoned her exclusive claim to the name "Hunyadi" or to her red and blue label, but is charged only with the imputed knowledge of manifold infringements and a furtherance of the same by her consignee, the Apollinaris Company, which fraudulently designed to deprive your petitioner by such practices of the name "Hunyadi" for its own benefit, but has been prevented by injunction from carrying such fraudulent scheme to perfection.

FIFTEENTH.—That there is no "Hunyadi" spring in existence in Hungary nowadays outside of the "Hunyadi Janos" springs of your petitioner, and your petitioner's exclusive rights to the names "Hunyadi" and "Janos" are recognized in all civilized countries, excepting in the United States of America, where they are denied by said decision of the Circuit Court of Appeals. That such denial, if sustained, would practically destroy your petitioner's business in the United States.

SIXTEENTH.—The opinion of the said Circuit Court of Appeals was rendered on the 5th day of January, 1899, and remanded the cause to the Court below with instructions to dismiss the bill; that the decree of said Circuit Court of Appeals was duly entered, and its mandate has been issued.

SEVENTEENTH.—And your petitioner further represents that said decree of said Circuit Court of Appeals is final between the parties unless this Honor-

able Court should of its own motion direct the 37
bringing up for review of said cause.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Honorable Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Emilie Saxlehner, Complainant-Appellant *vs.* Eisner & Mendelson Company, Defendant-Appellant, No. 1024," to the end that the case may be reviewed and determined by this 38
Honorable Court as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

30

EMILIE SAXLEHNER,
Petitioner.

By

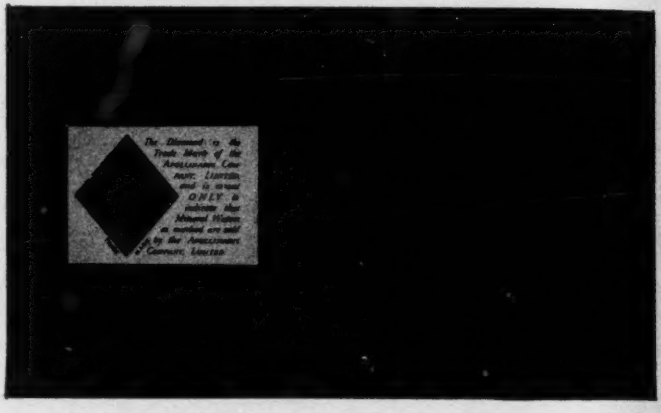
JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted this 11th day of February, A. D. 1899.

Eisner & Mendelson Co
Defendant.
by Charles G. Cox
Edmund Wetmore
its attorneys & Counsel

Complainant's Labels.

"Exhibit A."



"Exhibit B."

Defendant's Labels.

"Exhibit C."

"Exhibit D."

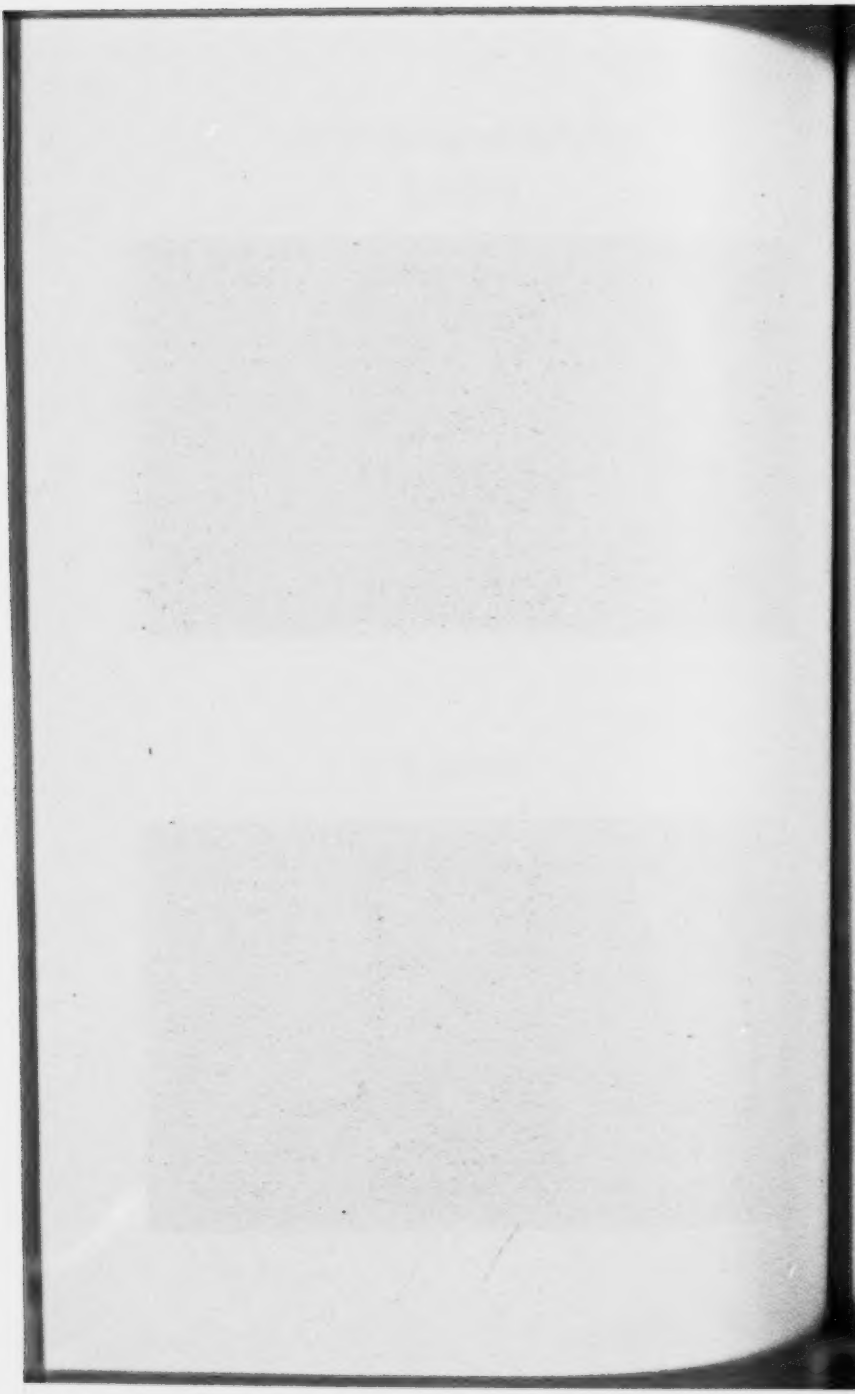


Exhibit E.

40

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER

v.

EISNER & MENDELSON COMPANY.

41

SAME

v.

SIEGEL-COOPER COMPANY.

SAME

v.

RUDOLPH GIES.

42

SAME

v.

LOUIS MARQUET.

SHIPMAN, *C. J.*—These four bills in equity were brought to restrain the improper use of the complainant's trade-marks and labels, and in the three cases against retailers to restrain the fraudulent sale of the water from wells not of the complainant as the product of the wells which she owns.

43 The jurisdiction of the Court is founded upon the citizenship of the parties. The complainant resides at Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary. The Eisner & Mendelson Company is a corporation of the State of West Virginia, and transacts its entire business in New York City. The other three defendants are residents of the City of New York and citizens of the State of New York.

The following facts, which were alleged in the bills of complaint, or which are incidental thereto, were clearly proved:

Andreas Saxlehner, in about the year 1863, commenced to bottle the waters of a well of bitter water
44 owned by him, situated within the city limits of Budapest, Hungary, and for the purpose of distinguishing the bitter waters of this spring from other waters then known and on sale, adopted, in 1865, the arbitrary name or trade-mark of "Hunyadi Janos" for the water of his spring. Hunyadi Janos, or John of Hunyad, was a Hungarian hero who lived in the fifteenth century.

The business soon increased, additional wells were sunk by him in the same territory, which gave forth similar water, and in the course of time the water was exported beyond the limits of Hungary to other countries of Europe and also to the United States. When Saxlehner commenced this business he
45 adopted a characteristic and novel style of bottles, the same being of a straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos, Budai Keseruviz" (meaning Hunyadi Janos Bitter Water of Buda), together with a portrait, supposed to be the portrait of the hero, stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which were a division of the same into three longitudinal fields, the middle field bearing the said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of

the label, the color of the middle field being red. 46
As this water was exported to and sold in the various countries of the world a different custom concerning its appellation sprung up in different countries, the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos," or "Acqua di Janos;" while in England and the United States of America the name "Hunyadi" became its common appellation, it being known as "Hunyadi Water."

In the month of March, 1876, Andreas Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which he gave it the exclusive opportunity of selling his Hunyadi Janos Water in Great Britain, the United States of America and 47
other trans-marine countries for a term of years, which terminated finally on March 25, 1896. About this time a label was designed to be used on the bottles which were to be sold by the Apollinaris Company, Limited, of substantially the same contents and characteristic features, but of a different color, the body of the label being a blue color, retaining, however, the red color of the central field. A narrow strip on top of the label was added containing the imprint of the Apollinaris Company as importers, and ever since the making of this contract large quantities of Hunyadi Janos Water bearing this blue and red label were exported to the United States and sold here, the water being ordered and 48
sold under the short name "Hunyadi" or the full name "Hunyadi Janos." In the year 1889 Andreas Saxlehner died, whereupon his widow, the complainant, succeeded him in the business of bottling and exporting the Hunyadi Janos Water, and since the termination of the contract with the Apollinaris Company, Limited, she has continued to export to the United States and sell here the Hunyadi Janos Water in the same bottles and with substantially the same labels, the name of her firm being substituted in place of that of the Apollinaris Company on the labels. In the year 1887 Andreas Sax-

lehner caused the name "Hunyadi" to be registered as his trade mark for natural aperient waters in the United States Patent Office. By reason of the great care exercised by complainant and her predecessors in business in bottling it, the water has become widely and favorably known, and is commonly designated by consumers in the United States as "Hunyadi" water. Until the year 1890 complainant did not enjoy adequate protection in Hungary in the use of her trade marks and labels on account of a lack of statutes regulating such matters, by reason of which fact other persons in Hungary and in Europe used the name "Hunyadi" in connection with other names, imitating her labels, capsules and bottles, and she was unable to stop these practices; since 1890 the law of Hungary has been changed and she has succeeded in causing all these marks and labels to be suppressed in Hungary, including also the use of the names "Hunyadi Laszlo" and "Huyadi Matyas."

The bill of complaint complained of two different kinds of labels used by defendants in the sale of Hungarian bitter waters, one being marked with the name "Hunyady Matyas," while the other is marked with the name "Hunyady Laszlo," both labels being otherwise closely similar to complainant's label in their color, size, shape and general arrangement, stress being laid upon the tripartite division already described, the medallion portrait on the centre label, the blue and red color, the name "Hunyadi," and also the similarity of the capsules used on both bottles, the bottles being of the same size and shape. It is alleged that these were adopted by the defendants with full knowledge of the complainant's rights and for the purpose of imposing upon the public and depriving the complainant of the benefits of her business. The bill of complaint thus is of a twofold character, being brought for infringement of trade-mark rights of the complainant, and also to enjoin an unfair competition by means of simulated labels and insignia of trade. A decree for

permanent injunction, damages, profits and costs 52
was prayed for.

The wells of Andreas Saxlehner, which finally became 112 in number, are situated in the Valley Orsod, near the inhabited part of the City Budapest, and cover an extent of one hundred acres and produce an aperient water.

In 1873, one Ignatius Markus, the proprietor of a spring of bitter water in Budapest, applied to the city authorities for permission to call the spring and its water by the name "Hunyadi Matyas," and to register this name as a designation of the water. This application was successfully opposed by Saxlehner before the local authorities, but the decision was reversed upon appeal to the Min- 53
ister of Agriculture, who held that the two names were sufficiently distinct and that it sufficiently appeared that the waters of the springs were of the same quality, and granted Markus' petition. Afterwards this spring was registered in Budapest by the name of Hunyadi Matyas.

Thereupon the proprietors of other wells commenced to sell their waters in Europe under the name Hunyadi, with some added name, with the use of a close imitation of the red and white labels.

Saxlehner made, in 1887, another unsuccessful attempt to stop the employment of the name Hunyadi when applied to the water called Hunyadi 54
Joseph. His Hunyadi Janos Water had been sold by him in the United States under the red and white label, to a limited extent, before March, 1876, when he made his contract with the Apollinaris Company of London. By the contract he "abandoned" to that company the exclusive sale of his Janos water in this country. It was to pay specified prices, it agreed to take yearly 100,000 half or entire bottles, and to sell no other bitter water. The goods were to travel at its risk, Saxlehner was to furnish careful package and faultless bottling. Upon the red part of the label there was a warning

55 signed by Saxlehner that "imitation of this water, or of the label or of the capsule, will be the subject of legal proceedings at the instance of the Apollinaris Company," but the company did not agree to institute such proceedings.

The contract was for ten years, and was afterwards extended for twenty-five years beginning January 1, 1876, but the company could withdraw upon twelve months' notice. Saxlehner had no such right of cancellation.

The company went on in the business of selling Janos Water in the United States without a competitor of importance until 1886, and succeeded in developing a very large business, and the water had
56 secured for itself a high popular and medical reputation under the short name "Hunyadi." In 1886, Mattoni & Wille, of Budapest, consigned to one Andreas in New York one hundred and twenty-one cases of their "Hunyadi Matyas" bitter water. This firm had bought four springs in Budapest, one of their purchases being the original Markus spring, and in 1877 they registered in Hungary four trademarks for four several wells, viz., Szcihenyi, Deak, Sz-Istvan and Hunyadi Matyas. Ignatz Ungar & Son became in 1880 the owner of a Budapest spring, which they called "Hunyadi Arpad," and registered the name in Hungary, and in 1886 began to sell the water from it in New York City through
57 Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels; the Matyas bearing the words "Hunyadi Mathias Quelle" in small print was put up in red and white labels.

Suits were promptly, and before Andreas had an opportunity to sell his lot, commenced in 1886 in the United States Circuit Court for this district by the Apollinaris Company against these agents to enjoin against the use of the trade name "Hunyadi" and of the labels, but were withdrawn on the ground of want of jurisdiction, and two suits, one against Andreas and the other against

Ungar, were brought by the Apollinaris Company 58
in the Supreme Court in the City of New York. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when on application of the defendant in the Ungar case, the injunction in that suit was dissolved, no one appearing in opposition and soon after the injunction in the Andres suit was dissolved without objection, and the suit was voluntarily discontinued.

An attempt was made by the Eisner & Mendelson Company to show that the Apollinaris Company notified Saxlehner of the pendency of the motion to dissolve the injunction in the Ungar case, and his refusal to assist in the opposition, but the offered 59
testimony was merely hearsay and was inadmissible.

After the dissolution of these injunctions, the Hunyadi Arpad and the Hunyadi Laszlo Waters were sold in this country by the agent of Ungar, until 1892, who also sold the Hunyadi Bela Water to a limited extent, all under the general name of Hunyadi, and with the imitation red and blue label. The Arpad Water was extensively advertised. The sale of the Matyas Water was not renewed, but the quantity on hand was disposed of under changed label.

The Apollinaris Company published in April 6, 1889, and thereafter in 1889 and 1890, the following 60
advertisement:

"The Appollinaris Company, Limited, London, beg to announce that as numerous Aperient Waters are offered to the public under names of which the word 'Hunyadi' forms a part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond. This label will henceforth also serve to distinguish the Hungarian Aperient Water sold by the company from all other aperient waters."

After April, 1889, and until the cancellation of

61 the contract in 1896, this company placed upon each bottle of Janos Water which it sold in this country, a red diamond, containing these words, "The red diamond is the trade-mark of the Apollinaris Company, Limited, and is meant *only* to indicate that the mineral waters, so marked, are sold by the Apollinaris Company, Limited."

In 1886 or 1887 the Apollinaris Company purchased a spring of bitter water under the name of Apenta, in Budapest, and, immediately upon the dissolution of the contract, began to push the sale of this water in this country and in England, under the name of "Apenta from the Uj (new) Hunyadi Springs at Budapest," with the red diamond label.

62 Its use of the word Hunyadi was stopped by injunction in England in June, 1897, and was abandoned in this country.

The Eisner & Mendelson Company of Pennsylvania, the predecessor of the present defendant, which was organized in April, 1892, and succeeded to all the business and contracts of its predecessor, made a contract dated July 30, 1889, with Heinrich Mattoni, the owner of the springs, the water of which had been sold by Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of the bitter waters which he owned, for the term of twenty years from September 1, 1889.

63 Eisner, who acted for the Eisner & Mendelson Company, saw half a dozen different Mattoni labels, but devised a new one for the American market and imported some 20,000 bottles in 1889 and 1890, under the name "Royal Hungarian Bitter Water" upon a red and white label. In July, 1890, the Eisner & Mendelson Co. took a lease for five years with an option for a renewal for twenty years thereafter, from Mattoni, of the so-called "Hunyadi Matyas Spring No. 2" and became entitled to have all the bitter water for its American use bottled from this spring. This lease superseded the previous contract, The reason which induced Eisner to make this lease,

was his desire to control the American label, so that 64
neither Mattoni & Wille nor European purchasers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label and is described in the complaint, containing the name "Hunyadi Matyas" "Buda Keseruviz" and a medallion portrait of King Stephen in the centre of the red division. He intentionally simulated the Saxlehner United States label for the purpose of obtaining, by means of the simulation, a part of the good-will which the Janos Water had gained. This "Matyas Spring No. 2" was not the original Matyas Spring, in regard to which Markus had his litigation in 1873, but was another spring called the "Franz 65
Deak" spring, which Mattoni & Wille bought in 1876 from Michael Ivanyi and wife, and was the spring registered in 1877 under the name "Deak."

In May, 1890, the Eisner & Mendelson Company commenced vigorous measures to advertise this water and introduce it through circulars and newspapers and sample bottles, to the druggists and to the physicians. It was extensively advertised as a Hunyadi water, and being sold below the market price of the Janos water, has been largely bought, especially by druggists who receive the custom of the class which desires economy.

On May 2, 1892, the present Eisner & Mendelson Company entered into a contract with Ignatz Ungar 66
& Sons for the sole agency in the United States of their waters from four Hungarian springs, the Hunyadi Arpad, Hunyadi Bela, Victoria and Racoczy Georgy, and acquired by purchase from Perrine & Co., the Ungar agents in New York, their rights under the contract which they had held. In April, 1892, it acquired from a Paris corporation the exclusive right to the sale in this country of a Hungarian bitter spring water called "Hunyadi Laszlo." These various waters, with the exception of the Victoria and the Georgy, were sold under the name Hunyadi and with the red and blue label.

67 In April, 1893, the Apollinaris Company, for the purpose of counteracting the idea that the Eisner & Mendelson Co. had become lessees of all the Hunyadi springs, issued an advertisement and postal cards, of which the following is the important part:

"Before any Hunyadi Water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced the Hunyadi Janos Water, the proprietor in Buda Pest of the springs having entrusted to them, for a term of years still unexpired, the sole sale of this water in England and in all transmarine
68 places. Hunyadi Janos Water having become very popular, quite a number of other waters are now offered for sale, under names, of which the word Hunyadi forms part, and in bottles and with labels, closely resembling in appearance and color those long used for Hunyadi Janos Water.

The word 'Hunyadi' having become a general name for Hungarian bitter waters, good, bad, or indifferent, the Apollinaris Company affixed to the bottles of Hunyadi Janos, the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris
69 Company, Limited."

On July 6, 1893, the complainant bought from Ignatz Ungar & Sons the Ungar Springs, the Ungar contract with the Eisner & Mendelson Company was terminated, and the importation of those waters ceased. In 1895, or 1896, the defendant ceased to import the Laszlo waters.

In 1893, the Eisner & Mendelson Company began to use and has used ever since, upon their standard bottles of Matyas water, an additional label consisting of a red seal upon a white ground and containing the words "Ask for the Seal Brand. This label has been adopted to protect the public from

imitation and as a guarantee of the genuineness of the Hunyadi Matyas Water imported solely by Eisner & Mendelson Co., New York." The attention of druggists has been called to this seal brand by advertisements in the trade papers. The Mattoni lease was renewed for twenty years from March 1, 1895. The Apollinaris Company during the continuance of its Saxlehner contract did not object to the Eisner & Mendelson Company's operations or trade-marks, or representations, except in one particular, which was changed at the former's request. 70

The following table, compiled by the agent of the Apollinaris Company, from the *Journal of Commerce* and *Bonfort's Journal*, which are considered to be authorities upon the subject of importations, states the number of cases of so-called Hunyadi Water, other than Janos, reported in those journals to have been imported into the United States from 1886 to 1896, inclusive: 71

IMPORTATION INTO THE UNITED STATES OF THE FOLLOWING WATERS:

NAME.	1886.	1887.	1888.	1889.	1890.	1891.	1892.	1893.	1894.	1895.	1896.	TOTAL.
Hunyadi Arpad...	201		1,000	7,649	7,979	3,752	4,438	2,882—Jan. 1 to Apl. 30.				27,901
" Corvin..					20							20
" Matyas..					2,390	4,662	4,531	1,954	6,210	5,185	520	25,652
" Laszlo...					200		397	264	235	268		2,064
" Bela.....						307	168	284				919
" Jozsef...						139			144			276
" Lajos. .						667	2,265	2,772	6,148	528		11,380
" Miklos..									132			132
" Vilmos..										263		263

72

The figures given represent cases, each containing fifty (50) bottles.

In 1894, and in October, 1896, the Hungarian Minister of Commerce canceled all the Hunyadi Matyas trade-marks and also five illustrated labels for Hunyadi Matyas bottles, and also canceled the Hunyadi trade-marks of all the claimants or users thereof, except the one belonging to the complainant. This action was taken upon her petition and under au-

73 thority of progressive Hungarian litigation on the subject in 1890 and in 1895, so that it is established in Hungary that the complainant is alone entitled to the use of the word "Hunyadi." This litigation was vigorously conducted by the complainant. The questions in regard to the right of the Eisner & Mendelson Co. to the use of the name Hunyadi and of the Saxlehner label depend upon circumstances which differ in important particulars. The Hunyadi question is by far the most important to the parties.

In 1886, when substantial competition in the sale of Hunyadi bitter waters made its appearance in this country, the name Hunyadi was in fact the
74 established trade-mark of the Janos Water. It was prevented from taking that position in Hungary or in continental Europe by the decision of 1873, which declared that Hunyadi Janos and Hunyadi Matyas were different names. Whether, upon an attack, Saxlehner could have then maintained his right to have an exclusive use of the name in this country is not now clear. The Apollinaris Company having obtained *ex parte* injunctions, abandoned them in 1888, influenced in part probably by the failure of Saxlehner in the Hunyadi Joseph litigation of 1887, published their advertisement of 1889, which announced that their red diamond would serve to distinguish the Janos Water, and again in 1893 published
75 a notice that the word "Hunyadi" had become a general name for Hungarian bitter waters of all varieties of excellence. Much reliance has been placed by the defendant upon these statements, upon the theory that they were made by the agents of Saxlehner. The Apollinaris Co. was never an agent of the owner of the well. Their relations were those of seller and buyer. The company simply agreed to buy a specified number of bottles yearly and to introduce no other bitter water. It did not agree to use any other efforts to protect the good-will or the trade-marks of Saxlehner, or to use any efforts to promote his business or his

pecuniary interests, and it could cancel the contract 76
upon notice. Inasmuch as it was the sole person who had the right to sell the Janos Water in this country and to use its trade-mark and to enjoy the good will of the business, it was in a position in which it could in fact destroy the name and the good-will, if its own interest dictated such a course. In considering the reasons, legal and commercial, which induced the Apollinaris Company to publish its advertisements and to rely upon its red diamond label, it is right to say that the history of the Hungarian litigation and of the continental use of "Hunyadi" presented a legal reason, which was at least very plausible for the conclusion that kindred waters could use the name anywhere 77
and served to embarrass a litigant in the attempt to enforce an exclusive right to it in the United States. Whatever may have induced the action of the Apollinaris Company, it did, notwithstanding the name had become localized here, abandon, in terms and positively, a claim to a right to its exclusive use and affirmed that it had become in practice a general name. As the name had become in fact a trade name in 1886, so, also, it could by affirmation and positive action cease to be such, and when it had publicly become open to use by competitors, the persons who invested their money, in the honest belief that the name was public property, should have a fair standing in a court 78
of equity. I am obliged to say that by the positive action of the corporation, which alone had the right to the enjoyment of the name in this country, and which had the right to bring suits for its protection, it became, after 1888, one which dealers in Hungarian bitter waters could use a prefix to the other specific name of the respective waters. They could not call their water "Hunyadi," but they could use the word as a prefix.

Two causes contributed to this result, first, the action of the Hungarian authorities, and secondly, the careless contract by which the Apollinaris Com-

79 pany entered into no contractual obligations to protect Saxlehner's interest or property.

The question in regard to the label is a different one. The red and blue label was Saxlehner's label in England and in this country. He devised it, and his sole right to its use was never entangled by any claim of a public right to use it wherever Hungarian bitter waters are sold, and before the injunctions were dissolved in 1888, his exclusive right in this country was undeniable. After the dissolution it was used upon the Arpad Water, until July, 1893, when its further use was effectively stopped by the action of the complainant. It was not used upon the Matyas Water until 1890, when the defendant
80 abandoned the use of the Mattoni label, which it had devised, and assumed the insignia of the Janos Water, with a simulated change of color from red to reddish brown. It is said, however, that the Apollinaris Company also abandoned to the public any claim to an exclusive right to a red and blue label. Its action in regard to the name was positive, but it neither asserted nor admitted anything in regard to the label. It simply did not act against its use upon the Arpad Water, which as the table of importations shows, was the only competitor of importance until 1890, nor against the Matyas, which did not come into the field with this label until July, 1890. The other waters whose names were
81 frequently repeated in the record, were of no importance as competitors, certainly until 1895, when the Apollinaris Company gave notice of its intent to cancel the contract. Its conduct in regard to labels was that of indifference and of laches and can give no rights, as against the complainant, to the Eisner & Mendelson Company, who started in 1890 to use her label and feigned to have avoided it. The charge of laches against the complainant or her predecessor is not adequately sustained. Neither of them could practically accomplish anything through litigation in this country, until the cancellation of the Apollinaris contract. In November, 1895, the son

of the complainant came to this country to take 82
charge of his mother's business, and he has been active in litigation since the contract closed, and in October, 1896, notified the defendants of his proposed suit against it. The defendant has, however, since 1893, for the purpose of having a mark of its own and thus avoid the injurious effect of new competition, used a distinctive "Seal Brand," which is a red seal upon a white ground, large enough and peculiar enough to be easily recognized, and which informs the public, in substance, that the water is Matyas Water, and is sold only by the defendant. Inasmuch as the name Hunyadi can be used in this country by rivals of the Janos Water, I think that this label is a sufficient attempt on the 83
part of the defendant to assert that it is the seller of Matyas Water, and that since 1893 it frees the complainant from the charge which before that time was true, that it was cajoling or deceiving the ordinary retail purchaser into the belief that he was buying the Janos Water. This freedom applies only to the water sold under the "Seal Brand."

In the spring of 1896 the Eisner & Mendelson Company imported a few hundred cases of another kind of Matyas Water, which was called No. 3 and which they sold without the Seal Brand and with 3 marked upon the red and blue label. It would not be an infringement, except for the use of the three well known longitudinal red and blue fields of the 84
Saxlehner label, the field covering the whole bottle, and the red field in the middle with a medalion portrait. The company ceased to import this water and it also ceased in 1895 or 1896 to import the Laszlo Water, which was sold under its red and blue label, but it claims the right to sell these or any other Hunyadi waters under the simulated label of Saxlehner. It ceased to make these importations for financial reasons only.

Let there be an interlocutory decree against further infringement of this label and for an accounting for the damages occasioned by past in-

85 fringements since April 13, 1892, the date of the organization of the defendant. The question of costs will be reserved until final decree.

The cases against retailers, which were based upon instances of a fraudulent sale of Matyas Water, representing it to be Janos, were defended by the Eisner & Mendelson Company, and all the cases were presented in one record.

There is no substantial evidence of fraudulent conduct on the part of Siegel Cooper Company, and the bill is dismissed, without costs. The testimony in regard to sales at the retail drug stores of Rudolph Gies and Louis Marquet satisfies me that the clerk in charge at each of those stores, in response to
86 special requests for Janos Water, wrapped up and delivered bottles of the Matyas Water of the Eisner & Mendelson Company. In each case the witnesses were evidently mistaken in regard to the figure and complexion of the clerk, but I have little doubt that the man in charge made the deliveries as testified. Their sales were probably not large enough to justify the expense of taking an account, but there should be in each case an injunction against a sale of Matyas Water as and for the Janos Water of the complainant, without costs.

ANTONIO KNAUTH, for the Complainant.
EDMUND WETMORE and CHARLES G. COE, for
87 the Defendants.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Emilie Saxlehner *v.* Eisner & Mendelson Company.—Same *v.* Siegel-Cooper Company.—Same *v.* Rudolph Gies.—Same *v.* Louis Marquet.—Opinion.—Shipman, *C. J.*—U. S. Circuit Court.—Filed Jun. 28, 1898.—John A. Shields, Clerk.

88

Exhibit F.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

EISNER & MENDELSON COMPANY,
Defendant-Appellant.

89

SAME,
Complainant-Appellant,

vs.

SIEGEL-COOPER COMPANY,
Defendant-Appellee.

SAME,
Complainant-Appellant,

vs.

RUDOLPH GIES,
Defendant-Appellee.

90

SAME,
Complainant-Appellant,

vs.

LOUIS MARQUET,
Defendant-Appellee.

Of these four suits the first is one against a wholesale dealer in imported Hungarian mineral waters

91 which it offers for sale as Hunyadi Matyas, and as Hunyadi Laszlo, and puts up with wrappings and labels simulating complainants. The other three suits are against retail dealers. The complainant sought to enjoin the use of the name Hunyadi with or without prefix, and also to enjoin the use of any label simulating the well known red and blue label of Hunyadi Janos water, which water complainant owns and controls.

The Circuit Court at final hearing upon pleadings and proofs, dismissed the bills as to the name Hunyadi. It sustained them as to the label, except that it held that the use by defendants of a certain additional label, known as the "seal label," sufficiently differ-
92 entiated the goods offered for sale. The complainant has appealed in all four cases, and the defendant in the first case has appealed from so much of the decree as finds that the complainant is entitled to the exclusive use of the red and blue label, and that defendant should account for sales under that label prior to the introduction of the "seal label."

LACOMBE, *Circuit Judge:*

The opinion of the Judge who heard the cause in the Circuit Court is most careful and exhaustive. The voluminous facts are most fully rehearsed and an examination of the records shows that they are
93 accurately stated; indeed, we do not understand that the appellant controverts so much of the opinion. It would be a waste of time to rehearse all these facts here; the opinion of the Circuit Court is reported in Fed. Rep., , and may be there consulted. We concur in the conclusion of that Court that when these suits were begun in 1897 complainant was not entitled to the exclusive use in this country of the word "Hunyadi," which had before that time become a general name properly applicable to Hungarian bitter waters, so long as they were differentiated from each other by distinctive individual names, such as Hunyadi Janos, Hunyadi Matyas, Hunyadi Arpad,

&c. This conclusion is reached, not upon any 94
theory that the Apollinaris Company was the agent of complainant and her predecessors, but because the *latter's* acts and inaction alike make out a case of abandonment. In 1876 the original Saxlehner made a contract with the Apollinaris Company whereby he gave to them the exclusive sale of his Hunyadi Janos bitter water in the United States; that is, he sold to them all they required and agreed to sell to no one else in the United States, and not to sell for export there. Thereupon he devised the red and blue label for use on his bottles sold in the United States placing upon it a notice signed by himself that "imitation of this water, or of the label or of the capsule, will be the subject of legal 95
proceedings at the instance of the Apollinaris Company." Down to 1886 all went well, and at that time the name Hunyadi (the short form used in common speech) was in fact the established trade-mark of the Janos water, and the red and blue label its distinctive trade dress. At that time a few cases of other bitter water "Matyas" and "Arpad" appeared and were offered for sale as Hunyadi Arpad and Hunyadi Matyas, whereupon the Apollinaris Company secured injunctions against their sale. These injunctions, however, were dissolved and the suits discontinued in 1888. From that time on competition steadily increased. As the Circuit Court found: "After the dissolution of 96
these injunctions the Hunyadi Arpad and the Hunyadi Laszlo Waters were sold in this country * * * and also, to a limited extent, the Hunyadi Bela Water, and all under the general name of Hunyadi, and with the imitation red and blue labels." In 1890 the Eisner & Mendelson Company began the sale of Hunyadi Matyas under labels closely simulating complainant's and vigorously pressed the sale of it. The importations of competing waters into the United States from 1888 to 1895, all sold as Hunyadi Water, whether Arpad, Matyas, Laszlo or

97 what not, and nearly all offered under the red and blue labels aggregate as follows:

In 1889.....	7,649	cases (50 bottles each).
" 1890.....	10,789	"
" 1891.....	9,610	"
" 1892.....	11,899	"
" 1893.....	8,156	"
" 1894.....	12,570	"
" 1895.....	6,244	"

To check this appropriation of his trade name and trade label in the United States, Saxlehner, for nearly nine years—from the dissolution of the injunctions in 1888, down to the beginning of these
98 suits in 1897—did absolutely nothing. The Apollinaris Company, whom he had over his signature, proclaimed to the world as the suppressor of infringements, did take action, but not in the line of maintaining the trade name. In 1889 and again in 1890 that company announced that it had adopted an additional trade-mark of selection (a red diamond), which was to distinguish the Hungarian Aperient Water sold by it, and that it did so for the reason that numerous Aperient waters are offered to the public under names of which the word "Hunyadi" forms a part. In 1893 the Apollinaris Company issued a further circular in which it stated that: "The word Hun-
99 yadi having become a general name for Hungarian bitter waters, good, bad, and indifferent, the Apollinaris Company has affixed to the bottles of Hunyadi Janos water the red diamond, &c., &c."

In view of these facts, of the continued and increasing appropriation by competitors of his label and of his trade name (as a general designation) can a complainant who has for nine years done nothing towards maintaining or even asserting his original rights now be heard to suppress the competition which his supineness has allowed and indeed invited and encouraged to grow up? We think not. The case at bar seems to be one of those exceptional ones

referred to in Menendez *vs.* Holt, 128 U. S., 514, 100
where delay or acquiescence has been continued so long and under such circumstances as to defeat the right itself. Nor is the situation changed by Saxlehner's absence abroad. If he had chosen to sell his own goods in this country, thus becoming a dealer here familiar with the conditions of the business, he must inevitably have acquired the knowledge as to appropriation of the name and label, which the Apollinaris Company acquired, and if, with such knowledge, he went on year after year without even giving notice of dissent and non-acquiescence, there would surely come some time when he must be held to have abandoned his exclusive claims. And he cannot avoid the imputa- 101
tion of such knowledge, merely by selling his entire importation to a single person, leaving to that person the distribution of the goods to the trade here. If he wished to hold on to his trade name and trade label in this country he should either have taken steps to advise himself as to the situation, or should have seen to it that his selected vendee who shared with him in his monopoly took proper action to maintain his rights.

The Circuit Court reached the conclusion that although the trade name Hunyadi had thus been abandoned to the public the same was not true of the red and blue label, founding the distinction on the "positive action" of the Apollinaris Company 102
in making the declarations above quoted. Inasmuch as the company was not Saxlehner's agent he cannot fairly be held to be bound by any "positive action" of theirs of which he was not advised; but, as above stated, he is chargeable with their failure to act as much as with his own, and must be held to have abandoned all exclusive claim to the use in the United States either of the trade name or the trade label.

The decree of the Circuit Court is affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

103 **Exhibit G.**

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

EMILIE SAXLEHNER
vs.
EISNER & MENDELSON COMPANY.

SAME
vs.
SIEGEL-COOPER CO.

104

SAME
vs.
RUDOLPH GIES.

SAME
vs.
LOUIS MARQUET.

SAME
105 vs.
ALEXANDER NIELSEN.

Per Curiam:

We are unable to assent to the proposition that the provisions of the treaty are to be construed so as to hold that when the public in this country has acquired, through the owner's laches, the right to use a trade name and a trade-mark, such right is abrogated whenever by the operation of some subsequent Hungarian law the trade name and trade-mark is secured to him in Hungary. For that reason petition for reargument is denied.

FEB 17 1899
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 1898. 942. 30.

EMILIE SAXLEHNER,
Petitioner,

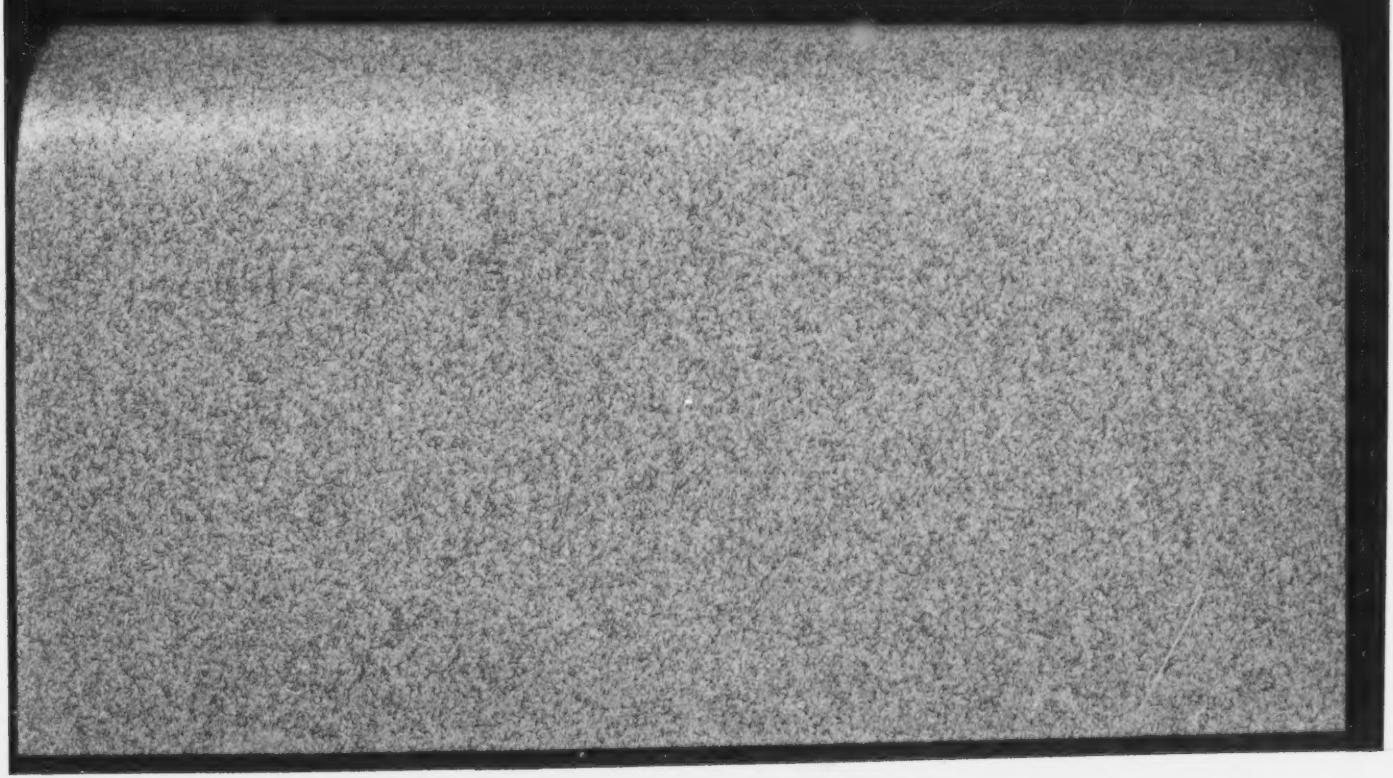
vs.

SIEGEL-COOPER COMPANY.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.



Supreme Court of the United States. 1

EMILIE SAXLEHNER,
Petitioner,

vs.

SIEGEL-COOPER CO.

October Term, 1898.

No.

Notice of Motion.

To SIEGEL-COOPER CO., the above named defendant: 2

Please take notice, that on Monday, February 20th, 1899, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,

JOSEPH H. CHOATE, 3
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February 1899.

Siegel Cooper Co.
Defendant.
by Charles G. Gore
Edmund Wetmore
its Attorneys & Counsel

4 SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner,	October Term, 1898.
vs.	
SIEGEL-COOPER CO.	No.

Motion.

And now comes Emilie Saxlehner, the above
5 named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and counsel, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and said Siegel-Cooper Co. was appellee.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi" and a red and blue label used in connection therewith upon complainant's bitter
6 water called "Hunyadi Janos." Your petitioner's right to said trade-mark and label has been held forfeited by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.

By
JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this 14 day of February 1899. 7

Siegel-Cooper Co
Defendant.
by Charles L. Loy
Edmund Wetmore
Its Attorneys & Counsel

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

No.....

EMILIE SAXLEHNER, Petitioner, *In re* Petition for a Writ of *Certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court for review and determination the case of EMILIE SAXLEHNER, Complainant and Appellant, vs. SIEGEL-COOPER COMPANY, Defendant and Appellee. 8 9

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner respectfully shows:

FIRST.—That petitioner is a subject of the King of Hungary and resides at Budapest, in the Kingdom of Hungary, and the defendant, Siegel-Cooper Company, is a corporation incorporated under the laws of the State of New York.

10 SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there is involved in said cause the validity or invalidity of petitioner's trade-mark "Hunyadi" for bitter water, and that of the label used by her, upon which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's
11 trade-mark rights in the name "Hunyadi," and also from selling bitter waters bearing colorable and fraudulent imitations of the red and blue label used by petitioner in connection with the said name "Hunyadi" on her bitter water called "Hunyadi Janos"; that the evidence in this case was by stipulation taken in one record with the similar case of your petitioner against Eisner & Mendelson Company (that being the principal case), in which a similar petition is simultaneously presented to this Court.

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and
12 label, and also with reference to the adoption and use of the "Hunyady Matyas" and "Hunyady Laszlo" labels employed by the defendant, are more particularly stated in the petition for writ of *certiorari* in said case against the Eisner & Mendelson Company. That the undisputed proofs in the case also show that the defendant Siegel Cooper Company had sold and was offering for sale Hungarian bitter water under the name of "Hunyady Lajos," bearing a label also made in close and fraudulent resemblance of petitioner's "Hunyadi Janos" label,

and was offering for sale said "Hunyady Matyas" and "Hunyady Lajos" waters as "Hunyadi Water." 13

FIFTH.—That there was no substantial conflict about the facts in the case, which were stated in detail in the opinion of Shipman, Judge, who decided the case at the Circuit Court, but dismissed your petitioner's bill of complaint on the ground that no actual or intended fraud of the defendant had been shown. That your petitioner appealed from the decree of the Circuit Court to the Circuit Court of Appeals of the Second Circuit, which affirmed the decree of the Circuit Court upon the ground that your petitioner's right to her trade-mark "Hunyadi," and to her red and blue label as used by her on the Hungarian bitter water, "Hunyadi Janos," sold by her, had been forfeited by laches. 14

Copies of the opinions of the Circuit Court and Circuit Court of Appeals, as also of your petitioner's labels and of the "Hunyady Matyas" and "Hunyady Laszlo" labels employed by the defendant are attached to the petition in the principal case against the Eisner and Mendelson Company.

SIXTH.—That your petitioner, previous to defendant's infringements, duly registered the name "Hunyadi" as a trade-mark for bitter water in the United States Patent Office, and likewise registered the same with the Chamber of Commerce and Industry of Budapest, and claims to be entitled to the benefit of the statutes of the United States in this regard, and of the treaty between the United States of America and Austro Hungary of June 1, 1872. 15

SEVENTH.—Your petitioner respectfully submits that said decision of the Circuit Court of Appeals is opposed to the law laid down by this Honorable

16 Court in sundry decisions, and is subversive of the rights guaranteed to your petitioner by said treaty and by the statutes of the United States.

EIGHTH.—That if the decision of the Circuit Court of Appeals, denying to your petitioner the relief claimed by her, is to be the law of the land, the health of consumers and the public at large will be seriously endangered, and your petitioner's business in the United States will be practically destroyed.

NINTH.—The opinion of the said Circuit Court of Appeals was rendered on the 5th day of January, 1899, and remanded the cause to the Court below
17 with instructions to dismiss the bill; that the decree of said Circuit Court of Appeals was duly entered, and its mandate has been issued.

TENTH.—And your petitioner further represents that said decree of said Circuit Court of Appeals is final between the parties unless this Honorable Court should of its own motion direct the bringing up for review of said cause.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sec-
18 ond Circuit, commanding the said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled, "Emilie Saxlehner, Complainant-Appellant, *vs.* Siegel-Cooper Company, Defendant-Appellee, No. 1,025," to the end that the case may be reviewed and determined by this Honorable Court as provided in Section 6 of the Act of Congress entitled, "An Act to Establish Circuit Courts of Appeal and to define and Regulate in Certain Cases the Jurisdiction of the Courts of the United

States, and for Other Purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit, in the said cause, and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.,

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted, this 11th day of February A. D. 1899.

Siegel Cooper Co
Defendant.

by Charles G. Cox
Edmund Wetmore
Its Attorneys & Counsel

FEB 17
JAMES H

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. XII 213. 31.

EMILIE SAXLEHNER,
Petitioner,

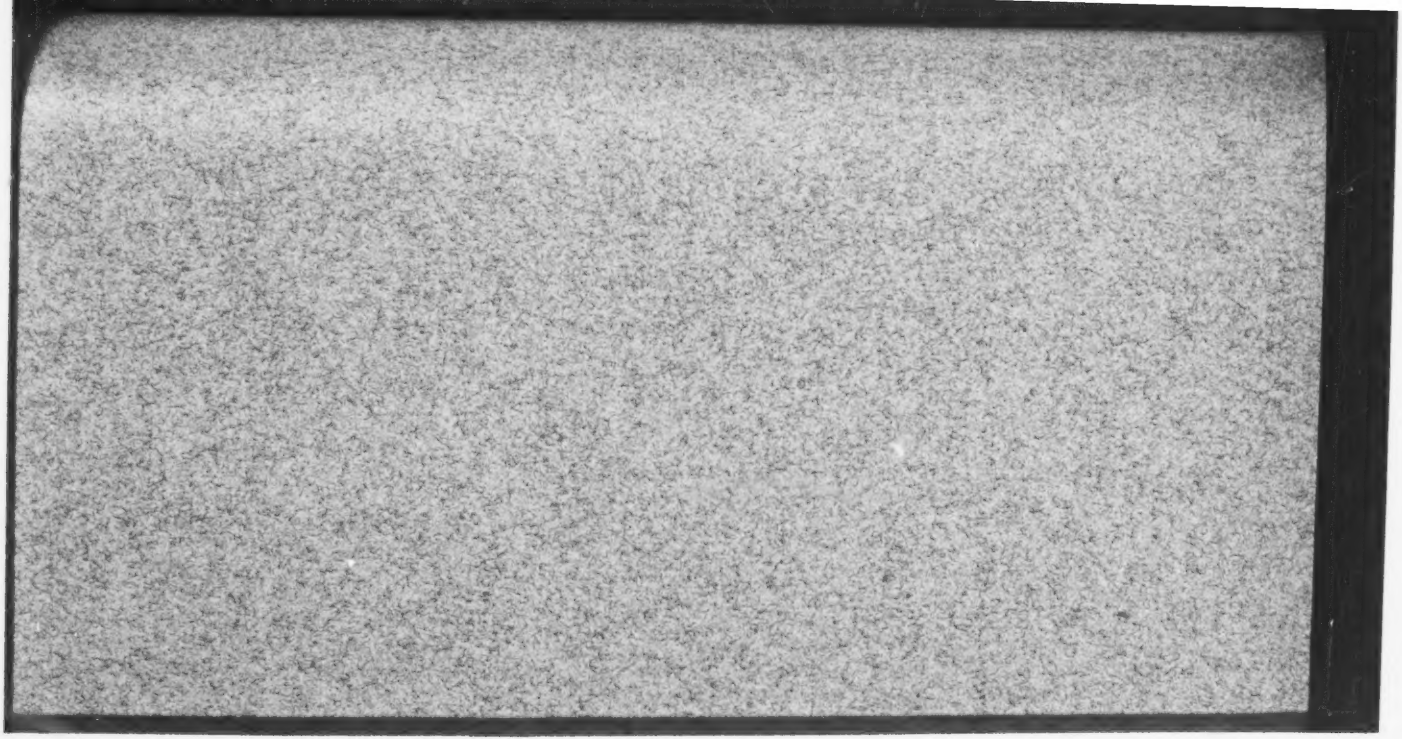
vs.

RUDOLPH GIES.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.



Supreme Court of the United States.

1

EMILIE SAXLEHNER,
Petitioner,

vs.

RUDOLPH GIES.

October Term, 1898.

No.

Notice of Motion.

To RUDOLPH GIES, the above named defendant:

2

Please take notice that on Monday, February 20, 1899, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

3

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February, 1899.

Rudolph Gies
Defendant.

by Charles S. Cox
Edmund Hetmore
its Attorney & Counsel

4 SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. RUDOLPH GIES.	October Term, 1898. No.

Motion.

And now comes Emilie Saxlehner, the above
5 named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and counsel, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and said Rudolph Gies was appellee.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi" and a red and blue label used in connection therewith upon complainant's bitter
6 water called "Hunyadi Janos." Your petitioner's right to said trade-mark and label has been held forfeited by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.
By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and
Counsel.

Due service of the foregoing motion is hereby admitted this 11 day of February, 1899. 7

Rudolph Gies
Defendant,
by Charles G. Cox
Edmund Wetmore
his attorney & Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No.....

EMILIE SAXLEHNER, Petitioner, *In re* Petition for a writ of *certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court for review and determination the case of EMILIE SAXLEHNER, Complainant and Appellant, 8

vs.

RUDOLPH GIES, Defendant and Appellee.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES: 9

The petition of Emilie Saxlehner respectfully shows:

FIRST.—That petitioner is a subject of the King of Hungary, and resides at Budapest, in the Kingdom of Hungary, and the defendant, Rudolph Gies, is a resident and a citizen of the State of New York, residing in the City of New York.

SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of

10 complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there is involved in said cause the validity or invalidity of petitioner's trade-mark "Hunyadi" for bitter water, and that of the label used by her, upon which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's trade-mark rights in the name "Hunyadi," and also from selling bitter waters bearing colorable and
11 fraudulent imitations of the red and blue label used by petitioner in connection with said name "Hunyadi" on her bitter water called "Hunyadi Janos." That the evidence in this case was by stipulation taken in one record with the similar case of your petitioner against Eisner & Mendelson Company (the principal case), in which a similar petition is simultaneously presented to this Court.

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and label, and also concerning the adoption and use of the blue and red "Hunyady Matyas" label upon a competing Hungarian bitter water, sold by the de-
12 fendant Rudolph Gies, are more particularly set forth in the petition for writ of *certiorari* in your petitioner's case against said Eisner & Mendelson Company.

FIFTH.—That the United States Circuit Court found that the defendant Rudolph Gies had fraudulently sold bitter water bearing the said red and blue "Hunyady Matyas" label as and for your petitioner's "Hunyadi Janos" bitter water, and decreed the issue of an injunction against said defendant enjoining him from a repetition of such acts; but refused your petitioner's prayer for an injunction

against said defendant enjoining him from the use 13
of the name "Hunyadi" either alone or as a prefix to some other name than "Janos," and refused likewise to enjoin said defendant from the use of red and blue labels bearing the name "Hunyady Matyas" provided with the additional "Seal Brand" label of the Eisner & Mendelson Company, and refused an accounting.

SIXTH.—That a decree in accordance therewith was entered in the United States Circuit Court on April 29, 1898, from which decree your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the Circuit Court, holding that your peti- 14
tioner's rights to her trade-mark "Hunyadi" and her red and blue label had been forfeited by laches.

SEVENTH.—That a petition for a rehearing was thereupon filed by petitioner in the Circuit Court of Appeals, and the Court's attention called to the treaty between the United States of America and Austro-Hungary, dated June 1, 1872, but such petition was denied.

EIGHTH.—That copies of the opinions delivered by the Circuit Court and the Circuit Court of Appeals, and also copies of the labels used by petitioner and by defendant respectively are attached to your peti- 15
tioner's petition for writ of *certiorari* in the case against Eisner & Mendelson Company.

NINTH.—That the decree of said Circuit Court of Appeals, affirming the decree of the Circuit Court, was duly entered, and its mandate has been issued.

TENTH.—And your petitioner further represents that said decree of the Circuit Court of Appeals is final between the parties, unless this Honorable Court should of its own motion direct the bringing up for review of said case.

16 ELEVENTH.—That your petitioner has duly registered her trade-mark "Hunyadi" in the United States Patent Office and has also duly registered the same in the Chamber of Commerce and Industry of Budapest, Hungary, and is entitled to the protection guaranteed to her by the said Treaty between the United States of America and Austro Hungary of June 1, 1872, and the statutes of the United States.

TWELFTH.—That if said decision of the Circuit Court of Appeals shall be the law of the land, anybody may with impunity sell any water whatever as your petitioner's well-known "Hunyadi" water
17 and under labels closely and fraudulently simulating your petitioner's label for "Hunyadi Janos" water, whereby the health of consumers and the public will be endangered and your petitioner's business practically destroyed.

THIRTEENTH.—That the grounds upon which your petitioner asks for a writ of *certiorari* in this case are more fully stated in the accompanying petition for a similar writ in the case against the Eisner & Mendelson Company.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the
18 United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Emilie Saxlehner, Complainant-Appellant *vs.* Rudolph Gies, Defendant-Appellee, No. 1026," to the end that the case may be reviewed and determined by this Honorable Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal and to define and regulate in certain cases

the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

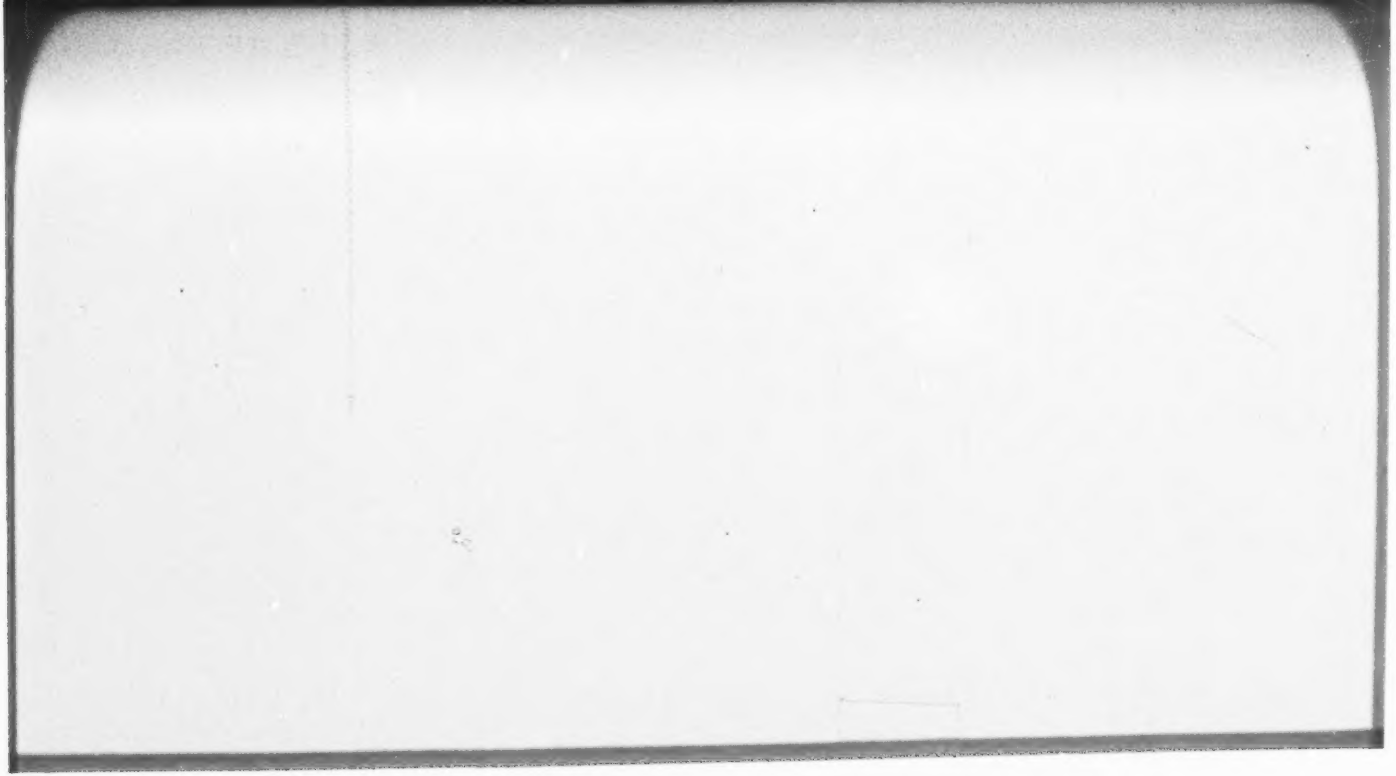
EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN and
ANTONIO KNAUTH,
her Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted, this 11th day of February, 1899.

Randolph Gies
Defendant.

by Charles D. Lee
Edmund Wetmore
his Attorney & Counsel



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FEB 17 1899
JAMES H. McKENNEY
Cl

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 715 2744 32

EMILIE SAXLEHNER,
Petitioner,

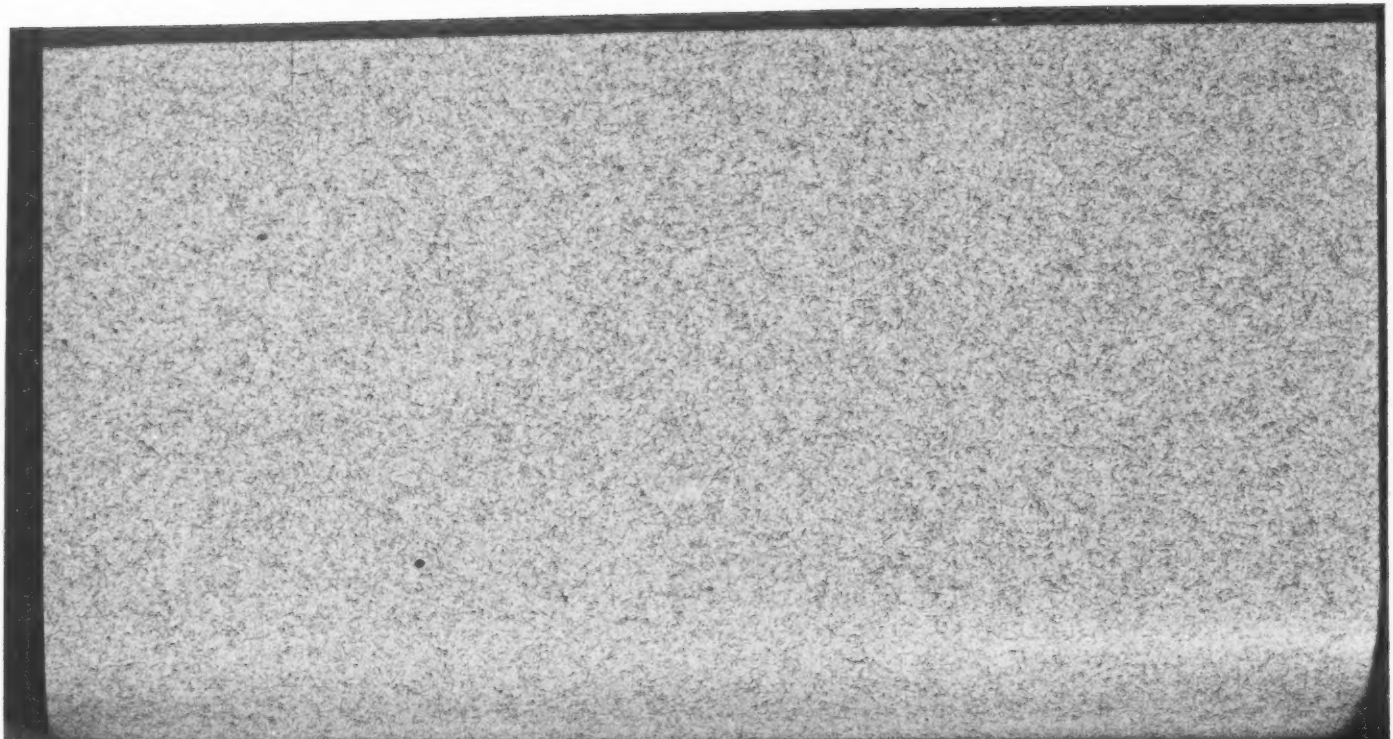
vs.

LOUIS MARQUET.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.



Supreme Court of the United States. 1

EMILIE SAXLEHNER, Petitioner,	October Term, 1898.
vs.	No.
LOUIS MARQUET.	

Notice of Motion.

To LOUIS MARQUET, the above named defendant: 2

Please take notice that on Monday, February 20, 1899, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States, at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,

JOSEPH H. CHOATE, 3
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February 1899.

Louis Marquet
Defendant.
by Charles G Bon
Edmund Wetmore
his Attorneys & Counsel

SUPREME COURT OF THE UNITED STATES

EMILIE SAXLEHNER,
Petitioner,

vs.

LOUIS MARQUET.

October Term,
1898.

No.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and
5 counsel, and moves this Honorable Court for a writ of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and said Louis Marquet was appellee.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi" and a red and blue label used in connection therewith upon complainant's bitter water, called "Hunyadi Janos." Your petitioner's right to said trade-mark and label has been held for-
6 feited by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
her Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this 11th day of February 1899.

Louis Marquet
Defendant.

by Charles G. Co...
Edmund Wet...
his attorneys & C...

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1898.

No.....

EMILIE SAXLEHNER, Petitioner,
In re petition for a writ of *certiorari*, requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court for review and determination the case of EMILIE SAXLEHNER, 8
Complainant and Appellant,

vs.

LOUIS MARQUET,
Defendant and Appellee.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner respectfully shows:

FIRST.—That petitioner is a subject of the King of Hungary, and resides at Budapest, in the Kingdom 9
of Hungary, and the defendant, Louis Marquet, is a resident and a citizen of the State of New York, residing in the City of New York.

SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there is involved in said cause the validity or invalidity of petitioner's trade-mark "Hunyadi" for bitter water, and that of the label used by her, upon

10 which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's trade mark rights in the name "Hunyadi" and also from selling bitter waters bearing colorable and fraudulent imitations of the red and blue label used by petitioner in connection with said name "Hunyadi" on her bitter water called "Hunyadi Janos." That the evidence in this case was by stipulation taken in one record with the similar case of your
11 petitioner against Eisner & Mendelson Company (the principal case), in which a similar petition is simultaneously presented to this Court.

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and label, and also concerning the adoption and use of the blue and red "Hunyady Matyas" label upon a competing Hungarian bitter water sold by the defendant Louis Marquet are more particularly set forth in the petition for writ of *certiorari* in your petitioner's case against said Eisner & Mendelson Company.

12 FIFTH.—That the United States Circuit Court found that the defendant Louis Marquet had fraudulently sold bitter water bearing said red and blue "Hunyady Matyas" label as and for your petitioner's "Hunyadi Janos" bitter water, and decreed the issue of an injunction against said defendant enjoining him from a repetition of such acts, but refused your petitioner's prayer for an injunction against said defendant enjoining him from the use of the name "Hunyadi" either alone or as a prefix to some other name than "Janos," and refused likewise to enjoin said defendant from the use of red and blue labels bearing the name "Hunyady Matyas," pro-

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Eisner & Mendelson Company, and refused an accounting.

SIXTH.—That a decree in accordance therewith was entered in the United States Circuit Court on April 29, 1898, from which decree your petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed said decree, holding that your petitioner's rights to her trade-mark "Hunyadi" and her red and blue label had been forfeited by laches.

SEVENTH.—That a petition for a rehearing was thereupon filed by petitioner in the Circuit Court of 14
Appeals and the Court's attention called to the Treaty between the United States of America and Austro Hungary, dated June 1, 1872, but such petition was denied.

EIGHTH.—That copies of the opinions delivered by the Circuit Court and the Circuit Court of Appeals, and also copies of the labels used by the petitioner and by defendant respectively, are attached to your petitioner's petition for writ of *certiorari* in the case against Eisner & Mendelson Company.

NINTH.—That the decree of said Circuit Court of Appeals affirming the decree of the Circuit Court 15
was duly entered, and its mandate has been issued.

TENTH.—And your petitioner further represents that said decree of the Circuit Court of Appeals is final between the parties unless this Honorable Court should of its own motion direct the bringing up for review of said case.

ELEVENTH.—That your petitioner has duly registered her trade-mark "Hunyadi" in the United States Patent Office and has also duly registered the

same in the Chamber of Commerce and Industry of Budapest, Hungary, and is entitled to the protection guaranteed to her by the said Treaty between the United States of America and Austro-Hungary, of June 1, 1872, and the statutes of the United States.

TWELFTH.—That if said decision of the Circuit Court of Appeals shall be the law of the land, anybody may with impunity sell any water whatever as your petitioner's well known "Hunyadi" water, and under labels closely and fraudulently simulating your petitioner's label for "Hunyadi Janos" water, whereby the health of consumers and the public will be endangered and your petitioner's business practically destroyed.

THIRTEENTH.—That the grounds upon which your petitioner asks for a writ of *certiorari* in this case are more fully stated in the accompanying petition for a similar writ in the case against the Eisner & Mendelson Company.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Emilie Saxlehner, Complainant-Appellant *vs.* Louis Marquet, Defendant Appellee, No. 1027" to the end that the case may be reviewed and determined by this Honorable Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may

seem appropriate and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.,

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE, ARTHUR VON BRIESEN and ANTONIO KNAUTH, her Attorneys and Counsel.

Due service of the foregoing petition is hereby admitted this 11th day of February, 1899.

Louis Marquet
Defendant.
by Charles G. Cox
Edmund Wetmore
his attorneys & Counsel

4653
FEB 17 1899
JAMES H. McKENNEY

Brief of Choate & Briesen for Pet

Supreme Court of the United States.

October Term, 1898.

Filed Feb. 17, 1899.

EMILIE SAXLEHNER, *Petitioner,*

vs.

EISNER & MENDELSON CO. 712

SAME

vs.

SIEGEL-COOPER CO. 713

SAME

vs.

RUDOLPH GIES. 714

SAME

vs.

LOUIS MARQUET. 715

SAME

vs.

ALEXANDER NIELSEN. 716

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and Counsel for Petitioner.

NEW YORK:
THE EVENING POST JOB PRINTING HOUSE, 156 FULTON STREET.
(EVENING POST BUILDING.)

1899.

Supreme Court of the United States,

OCTOBER TERM, 1898.

EMILIE SAXLEHNER, Petitioner, *In re* petition for a Writ of *Certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court for review and determination the case of

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

EISNER & MENDELSON COMPANY,
Defendant-Appellant.

SAME

vs.

SIEGEL-COOPER COMPANY.

SAME

vs.

RUDOLPH GIES.

SAME

vs.

LOUIS MARQUET.

SAME

vs.

ALEXANDER NIELSEN.

BRIEF ON BEHALF OF PETITIONER.

The above five cases all involved substantially the same questions, namely, petitioner's right to the name "Hunyadi" as a trade-mark for Hungarian bitter waters, and her exclusive right to the red and blue label and its characteristic features, used on petitioner's well-known Hunyadi Janos Water. The first and the last of these cases, those against the Eisner & Mendelson Company and against Alexander Nielsen, were brought against importers of competing bitter waters, while the other cases were brought against retailers of the same waters. By stipulation the testimony in the first four cases was combined in one record, while the fifth case against Alexander Nielsen has a separate record of evidence.

The decision of these cases involves very large pecuniary interests, because on it hinges the maintenance or destruction of complainant's entire business in the United States, which has been built up by her and her deceased husband, Andreas Saxlehner, through a period of more than thirty years. Saxlehner's Hunyadi Janos Water, whose yearly

output is about six million bottles, has become such a well-known commodity that no further statement concerning the money interests involved in these suits will be necessary. This, however, is not the only ground upon which we ask this Honorable Court for a revision of the judgment of the Circuit Court of Appeals. That judgment, which denies to complainant all relief against fraudulent imitation of her label and trade name, not only delivers her business over to the hands of unscrupulous competitors, but also deprives the public of that protection against imposition to which the public is entitled. It sanctions the perpetration and continuation of a pronounced fraud. It, in effect, licenses everybody who wants to reap an unjust gain by a fraudulent imitation of the well-known dress and popular name of the Hunyadi Janos Water in this country to do so, and invites all unscrupulous persons to take advantage of the situation.

We submit that this decision, which was rendered by two Justices of the Court, the third being disqualified, having adjudged the cases below, is opposed to the familiar doctrine of equity, that laches of the owner of a trade-mark in seeking relief are no defense to the issue of an injunction forbidding the further perpetration of a fraud upon the public and upon the complainant; that it is opposed to the law and to the undisputed facts of the case and is so manifestly against the established rules of equity that it should be reversed.

The Facts.

The facts relating to this controversy are carefully stated in the opinion of Judge Shipman who decided all these cases at the Circuit Court. The Circuit Court of Appeals refrained from reciting the facts again, accepting the condensed statement contained in Judge Shipman's opinion as a correct exposition of the facts. We will refer to only one of

them which seems to us to deprive the reasoning of the Circuit Court of Appeals of its logical basis. Ever since the Hunyadi Janos water was introduced into the United States, it had obtained among the public the short name of "Hunyadi water," and there being no other water for sale using the name Hunyadi than the Hunyadi Janos water of Saxlehner, the two names became identical. This is still the case, as evidenced by the uncontradicted testimony of fifteen physicians in the case, and Judge Shipman, therefore finds that Hunyadi water still means Hunyadi Janos water and that the sellers of other competing waters "could not call their water 'Hunyadi'," although by force of the circumstances related by him, he was of opinion that they could use the word Hunyadi as a prefix to some other name. The Circuit Court did not and could not from the evidence find that the name "Hunyadi" or "Hunyadi water," had changed its original meaning into a generic name for Hungarian bitter waters generally. The evidence is entirely clear and uncontradicted that during the time while the competitors of complainant have by means of fraudulent names and labels sought to reap the benefits and emoluments of her trade, other Hungarian bitter waters have all the time been imported and sold here under their own names and labels, not employing the name "Hunyadi" nor any of the characteristic features of complainant's label. These other bitter waters were not called "Hunyadi water" by the public, but each was called by its own name. That fact alone would dispose of the claim, were it made, that the name Hunyadi had become generic for imported Hungarian bitter waters. Again, the testimony has entirely dispelled the notion assiduously brought forward by the defendants that there was a certain group of so-called Hunyadi springs at or near Budapest, because it has shown that some of these imitating waters came from far away places in Hungary, and that the principal water in question, the Hunyadi Matyas

water imported by the Eisner & Mendelson Company, did not come from any spring called Hunyadi, but from a spring called "Deak," and that the name Hunyadi Matyas for that water had been adopted by the Eisner & Mendelson Company only and solely for the purpose of committing a fraud. This is distinctly found among the facts stated by Judge Shipman. The only reason which the witnesses for the defendants, such as wholesale dealers and druggists, give for *their* calling the infringing waters Hunyadi water, is that the name Hunyadi appeared on the label. The use of the name "Hunyadi" as a prefix to some other name like "Matyas," "Laszlo," "Lajos," &c., therefore, was only suggested by the fact that the water could now be palmed off upon the public of the United States as the well-known "Hunyadi water," the public not noticing the difference in the surnames or the slight difference in the coloring or arrangement of the red and blue labels used. Of the fraudulent character of all the imitations there can be no doubt, because every one who adopted an imitation of the name Hunyadi Janos also adopted an imitation of Saxlehner's *red and blue* label, and furthermore, when the same waters were sold in Hungary they were invariably sold under an imitation of Saxlehner's *red and white* label used in Hungary. Some pretense has been made that the Hunyadi Matyas Water of the Eisner & Mendelson Company was considerably advertised, but defendant's own record shows that the Hunyadi Lajos Water, which was not advertised at all, was sold in the same large quantities as the advertised Hunyadi Matyas Water. They were sold, not as Matyas nor as Lajos Water, but as "Hunyadi" Water, and the effrontery of the principal defendant went so far as to advertise the Hunyadi Matyas Water as the "*original* Hunyadi Water."

All these infringing waters were sold at a price much lower than that of complainant, and the situation is such that complainant cannot compete in

price with the imitation waters and at the same time maintain the standard quality and reputation of her Hunyadi Janos Water. If she cannot find protection in the courts of this country against such palpable fraud and injury, she will have to leave the market of this country to the unscrupulous imitators of her name and label and confine her efforts to the rest of the world, where her rights are recognized and respected. She cannot hope to supplant the name Hunyadi as the name of her water by another name, nor is it to be expected that the public will ever give up demanding "Hunyadi" and lay stress on the "Janos," which for nearly thirty years past has been slighted as unimportant.

The error of the Circuit Court.

The Judge deciding the case at the Circuit Court fell into an unfortunate error of law. The Circuit Court found itself "obliged to hold" that by certain assertions and positive action of complainant's vendee, the Apollinaris Company, complainant had abandoned her right to the name Hunyadi, and that after the year 1888, it was impossible for her to claim its exclusive use in this country. The Circuit Court held, however, that these positive assertions did not cover the label. It set forth in its opinion the reasons which excused Andreas Saxlehner and the complainant from bringing suit at an earlier time in this country, which consisted mainly in the unsatisfactory condition of the law in Hungary, and found that as soon as she was in a position so to do, complainant had energetically used every effort at her command to obtain redress, first in Hungary, and then in England and in this country. Consequently it held that complainant was not chargeable with laches and granted an injunction upon the label and an account for damages and profits, but refused an injunction on the name Hunyadi on the ground of abandonment of the name. We submit that this

refusal was erroneous. The Circuit Court also committed an apparent error in its decision by holding that the fraudulent red and blue Hunyadi Matyas label was sufficiently distinguished from complainant's label when a small "Seal Brand" label was attached to it and excepted this from the injunction and account. This error seemed to be the more inexplicable as all the instances of palming off the Hunyadi Matyas water as Hunyadi Janos water, shown by the evidence, occurred after the "Seal Brand" label was invariably added to the Hunyadi Matyas label.

The error of the Circuit Court of Appeals.

On appeal to the Circuit Court of Appeals it was completely shown that Judge Shipman's opinion that the name Hunyadi had been abandoned on behalf of complainant by the positive assertions of the Apollinaris Company was untenable. The Apollinaris Company had neither authority to abandon, nor had Saxlehner any knowledge of what the company did, and consequently the Circuit Court of Appeals disapproved that reasoning and held that there was no abandonment by positive assertions. The Circuit Court of Appeals also expressed, at the argument, its disapproval of the position taken by Judge Shipman upon the "Seal Brand" label and cut short any further argument on the same with the statement that in its opinion this Seal Brand label would not exempt the red and blue Hunyadi Matyas label from the charge of infringement. But the Circuit Court of Appeals have fallen into a graver error than the Circuit Court by holding that complainant and her predecessor in business were guilty of such laches with reference to the name Hunyadi and the red and blue label that complainant has lost all right to complain about the same and dismissing the several bills brought by her *in toto*, with costs.

Complainant was not guilty of laches.

We will not reiterate the facts found by the Circuit Court on this point, but simply call attention to the fact that previous to 1890 Saxlehner's right to the name "Hunyadi" in this country as an exclusive trade-mark for bitter waters was embarrassed and brought in question by the fact that the owners of other springs in Hungary could not be restrained there from calling their springs by names employing Hunyadi as a part, and that this was used as a pretext by imitators in this country to impair Saxlehner's chances of success here. It would, in our opinion, have been a sufficient excuse for inaction on his part if in this situation he had decided to resort first to the courts of Hungary to establish his right, as there was plausibility in the contention that if the waters of a certain spring could be called Hunyadi Matyas in Hungary, they could be called Hunyadi Matyas in this country. This defense received color of authority partly by the unsatisfactory condition of the Hungarian law, and also particularly by the Treaty between Austro-Hungary and the United States of America of June 1, 1872. By this Treaty it was provided that if a trade-mark was abandoned in the home country, it should be considered abandoned in the country of the other contracting party, and the inference was claimed to follow that if there was no trade-mark in the home country recognized in the word or label used, no such trade-mark should be recognized in the other country. Saxlehner, however, repeatedly tried to get relief in Hungary, but failed before 1890.

Nor can Saxlehner be charged with laches in not proceeding against the red and blue Hunyadi Arpad label, which had come into this country in 1886, and was stopped by injunction at the suit of the Apollinaris Company until 1888. If Saxlehner had brought suit or authorized a suit with a view to obtain an injunction against the *label* merely, he would undoubtedly have been held to have thereby

abandoned any exclusive claim to the name Hunyadi. The name and the label were always associated together, and the danger which attended one of them was a sufficient reason not to commence a suit upon the other alone.

In 1890 complainant obtained relief upon the label by a trade mark statute in Hungary, and in 1895 for the first time also upon the name "Hunyadi." She instituted a number of litigations in 1891 which were waged through the years 1891, 1892, 1893, 1894, 1895 and 1896, ending with her final victory in Hungary in October, 1896. *These litigations were directed against the very persons who furnished the imitating waters to the defendants*, and the evidence shows that the principal importers had early knowledge of these suits in Hungary.

Hence, that which is prohibited to defendants in Hungary is legalized in the United States by the decisions below as to labels which are applied to the infringing waters in the United States only, and when the Circuit Court of Appeals says in effect that she slept upon her rights for nine years, it ignores these five years of vigorous contest.

To charge complainant with laches in not instituting suit in this country at an earlier time would invoke a new rule of law which has hitherto not been applied by the courts. No one has ever been required by courts of equity to litigate rights which were so embarrassed by the conflicting state of law in the two countries, or where the litigant's position was such that he was not fully advised upon the situation, or there were sufficient reasons to excuse his inactivity. In the present case, instead of inactivity, complainant has displayed an unusual amount of energy in asserting her rights, and the same is true of her predecessor, Andreas Saxlehner. If they were not successful in Hungary earlier it was not their fault, but the fault of the Hungarian laws. Moreover, as to these defendants, who claim under Mattoni & Wille, it is clear that there were no

laches whatever, for while they only began to infringe here in 1890, she was as early as the summer of 1891 pursuing their principals by suit in Hungary, and as to the defendant Alexander Nielsen, a suit against his principal in Hungary was instituted before the time that he commenced to sell the "Hunyady Lajos" water in this country under a red and blue label simulating Saxlehner's.

We also submit that complainant had a right to seek the support of her claims given to Austro-Hungarian subjects in the United States under the Treaty with this country. All necessary steps were taken by Saxlehner in this direction by registering his trademark "Hunyadi" in connection with his red and blue label in the Patent Office of the United States in the year 1887, and registering the same label (because the name alone could not then be registered) in the Chamber of Commerce and Industry of Budapest. Such registration was made by him on December 30, 1884, and the red and blue label was re-registered in Budapest on July 14, 1890, (see Complainant's Exhibit No. 23, Label and Transfer Certificate). Such protection, however, could not accrue to complainant on the name "Hunyadi" until August, 1895, when the Hungarian statute for the first time allowed complainant to register that name independent of any pictorial design as a trademark in Hungary, which was then done. Far from showing any inactivity on the part of complainant, the evidence shows a continued struggle for recognition of her rights under the most adverse circumstances, and a charge of laches is, as we respectfully submit, entirely against the proofs and the facts in the case and sufficiently disproven by the statements contained in Judge Shipman's opinion.

The Circuit Court of Appeals rested its decision solely upon the supposed authority of the case of *Menendez* vs. *Holt*, 128 *U. S.*, 514. We do not understand that this decision has changed the law upon the subject as laid down by previous decisions

of the Supreme Court, and notably in the case of *McLean* vs. *Fleming*, 96 *U. S.*, 245. The total loss or forfeiture of trade-mark rights once obtained can, in our opinion, under these cases, not be produced by laches or negligence of the owner, even where they exist, unless the owner allows the word or sign to fall into public domain, that is, if he allows it to become part of the language of the country, as a descriptive term which never happened in this case. The Court will find that the dealers called only those waters "Hunyadi" waters which had the name "Hunyadi" rightfully or wrongfully on the label, and when the witness Scherer added the name Hunyadi to his unsalable Æsculap water and changed the label to a red and blue label making it salable thereby, he added one more "Hunyadi" water to his stock of such counterfeit waters. This simply proves fraud on a large scale, but does not prove that the name Hunyadi has become descriptive or generic. The same is true of the label. The sales of the imitation waters have undoubtedly been large, but the red and blue label has not become descriptive of any water, or any class of waters, or kind of waters, other than the plaintiff's own water, because other honest Hungarian waters are sold here under other names and labels, not employing the term, "Hunyadi." The Circuit Court therefore did not find that the name or label had become descriptive and lost their original meaning, but concluded that the complainant was bound in law by certain assertions of its consignee.

There is no feature of estoppel in the case. None of the parties who have infringed upon complainant's rights have done so innocently, but every name and every label has been adopted by them with fraudulent purposes.

The Circuit Court of Appeals held Saxlehner bound, not by the positive assertions of the Apollinaris Company, but because he "is chargeable with their failure to act, as much as with his own, and

must be held to have abandoned all exclusive claim to the use in the United States either of the trade name or the label." In the short opinion delivered upon the motion for a rehearing, the Court again emphasized that in its opinion Saxlehner's rights were lost by his laches.

That such laches cannot work an abandonment of the right, unless they have created a right in the defendant; that the act of abandonment involves an intention to abandon; that acquiescence by silence can be revoked and is then no bar to the issue of an injunction, is well established by the very case of *Menendez* vs. *Holt*, cited by the Circuit Court of Appeals. In this case the Supreme Court used the following language:

> "*The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired by that negligence the right to cut down the remainder* (*Attorney-General* v. *Eastlake*, 11 *Hare*, 205); *nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right* (*Fullwood* v. *Fullwood*, 9 *Ch. Div.*, 176). *Acquiescence to avail must be such as to create a new right in the defendant* (*Rodgers* v. *Nowill*, 3 *DeG., M. & G.*, 614). *Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and*

silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license' (Duer, J. Amoskeag Mfg. Co. v. *Spear, 2 Sandford (N. Y.), 599; Julian* v. *Hoosier Drill Co., 78 Indiana, 408; Taylor* v. *Carpenter, 3 Story 458; 8. C.. 2 Woodb. & Min., 1).*

"So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of estoppel could rarely arise."

Again, in the case of *McLean* vs. *Fleming*, 96 U. S., 245, 257, this Court, through Clifford, *J.*, stated:

"It sufficiently appears that the respondent has been engaged in preparing and selling his pills for more than forty years; that during that period, or more than half of it, he has been using labels and trade-marks corresponding more or less to those used by the predecessors of the complainant, some of whom, during all or most of that time, knew what the labels and trade-marks were which were used by the defendant, the evidence to that effect being full and decisive.

"Negotiations took place at one time between the respondent and one of the predecessors of the complainant for an interchange of commodities, with a view that both commodities might be sold at each of their respective places of business.

"Evidence of a decisive character is exhibited in the record to show that the complainant or his predecessor knew throughout what descriptions of labels and trade-marks the respondent was using, and it does not appear that any objection was ever made, except as heretofore stated and explained. Once the respondent was requested to insert the initials of his Christian name before his sur-name in the label, and it appears that he immediately complied with the request.

* * *

> "*Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven showing that the injunction was properly ordered, he is entitled to the costs in the Circuit Court, but the decree for an account and for the supposed gains and profits being erroneous, the respondent, as appellant, is entitled to costs in this Court.*"

In the recent case decided by this Court of the *Singer Manfg. Co.* vs. *The June Manufg. Co.*, 163 *U. S.*, 169, 186, the Supreme Court stated with approval a passage from De Marafy in his International Dictionary of Industrial Property, as follows:

> "*Abandonment in industrial property is an*
> "*act by which the public domain originally*
> "*enters or re-enters into the possession of the*
> "*thing (commercial name, mark or sign), by*
> "*the will of the legitimate owner. The essen-*
> "*tial condition to constitute abandonment is,*
> "*that the one having a riyht should consent*
> "*to the disposition. Outside of this there*
> "*can be no dedication of the right, because*
> "*there cannot be abandonment in the juridical*
> "*sense of the word.*"

In the comment upon this passage, this Court reasserted the equitable doctrine that even if the word had become public property by abandonment, it could be used by a defendant only in such manner as not to impose upon the public by making purchasers believe that they obtained the article of the original owner of the trade-mark. The present cases teem with evidence of such deception.

What right have the defendants obtained to the use of a label simulating Saxlehner's and to the name of a water which is not the name of the spring from which it comes? What interest or right has the public obtained by the long existence of the infringements to demand that such imposition should

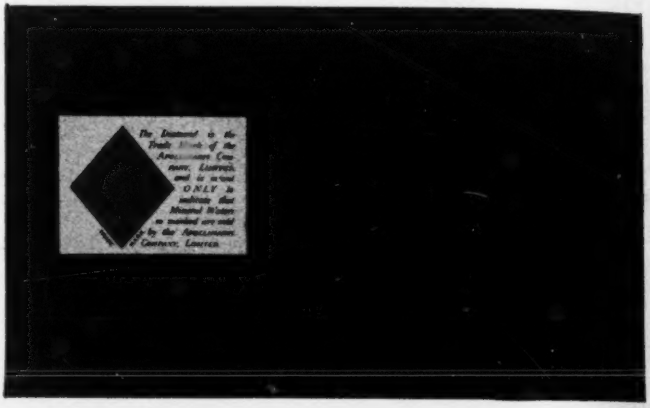
continue? Is there any vested right impaired or any capital honestly invested endangered by issuing an injunction against the fraudulent use of the competing names and labels? Can any defendant ever acquire the right to impose upon his customers by the use of a fraudulent name and label? The answer to these questions is manifest and we submit that every consideration of justice, the maintenance of public morality in trade and the protection of an unsuspecting public against imposition demand that the decree of the Circuit Court of Appeals be reversed and justice be done to the complainant in this country.

Respectfully submitted,

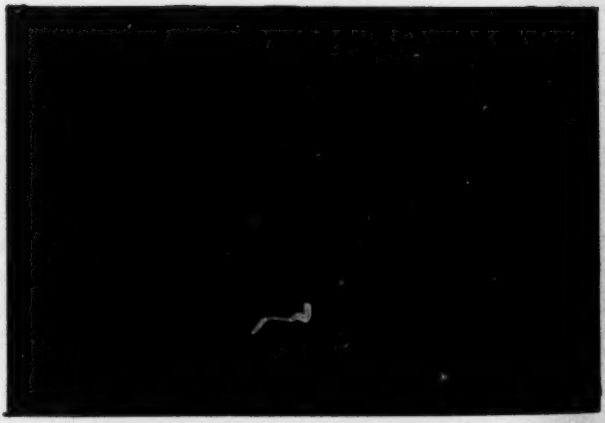
JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for
Petitioner Emilie Saxlehner.

Complainant's Labels.

"Exhibit A."

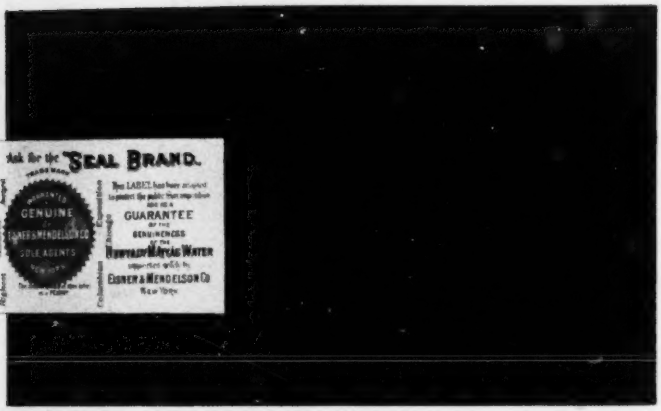


"Exhibit B."

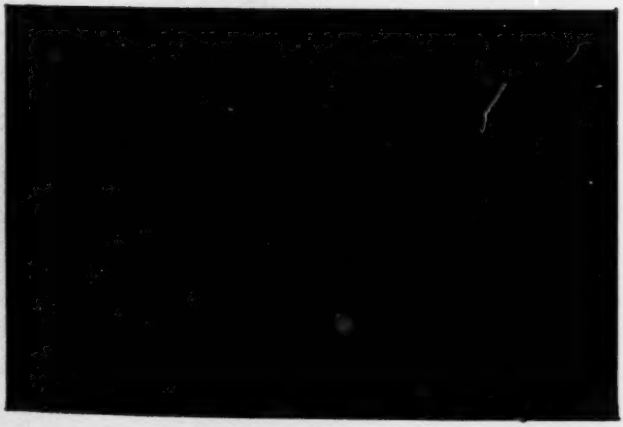


Defendant's Labels.

"Exhibit C."



"Exhibit D."



Supreme Court of the United States.

No. 211.
EMILIE SAXLEHNER, Petitioner,
vs.
THE EISNER & MENDELSON COMPANY.

No. 212.
EMILIE SAXLEHNER, Petitioner,
vs.
SIEGEL-COOPER COMPANY.

No. 213.
EMILIE SAXLEHNER, Petitioner,
vs.
RUDOLPH GIES.

No. 214.
EMILIE SAXLEHNER, Petitioner,
vs.
LOUIS MARQUET.

BRIEF ON BEHALF OF COMPLAINANT AND PETITIONER.

The above entitled cases come to this Court in obedience to writs of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The first case, in which the Eisner & Mendelson Company is defendant, is the principal case, and there is only one record of evidence for all cases before the Court, as the evidence in the three other cases, Nos. 212, 213 and 214, was by stipulation between counsel taken in one record with the principal case (Record, p. 72). The three additional cases thus joined to the principal case were brought against retail dealers and defended by the Eisner & Mendelson Company, who imported and furnished the commodity complained of to these retailers.

On petition of the complainant there was also a further writ of *certiorari* granted in a case brought against Alexander Nielsen, which is No. 215. This case was not defended by the Eisner & Mendelson Co. and has a separate record of evidence, but as the questions involved in that controversy were to a large extent the same, it was argued and decided at the same time and, as will be shown hereafter, mainly upon the strength of the facts proved in the suit against the Eisner & Mendelson Co. The facts specially applying to that case will be presented in a separate brief.

These cases involve the question of petitioner's exclusive right to the name "*Hunyadi*" as a trademark for Hungarian bitter waters, and her exclusive right to the red and blue label and its characteristic features used on petitioner's well known *Hunyadi Janos* water.

No question was raised in the Courts below concerning complainant's exclusive title, by first adoption, of the words "Hunyadi Janos" as a trademark, which name in the United States has been shortened to "Hunyadi"; and her exclusive title to

the red and blue label showing a division into three panels, with its characteristic features consisting of a medallion picture of the Hungarian hero Hunyadi Janos (John Hunyadi) and the name "Hunyadi Janos" and other descriptive matter contained thereon, and the whole controversy has turned about the question whether complainant's rights have been lost by abandonment or by such laches as would disentitle her to the relief prayed for in the several bills of complaint, which was an injunction against the use of similiar labels bearing inscriptions employing the name "Hunyadi" in some form or other, such as "Hunyadi Matyas," "Hunyadi Laszlo" and others, and an account of damages. For this reason we will only shortly refer to the early history of the Hunyadi Janos Water. In doing so, and hereafter throughout this brief we shall freely refer to the contents of certain ministerial and other official documents from Hungary, as these were made competent evidence of the facts certified to therein by a stipulation entered into between counsel for the respective parties (Record, p. 381).

The Hunyadi Janos Springs.

The Hunyadi Janos Springs of the complainant are situated within the city limits of Budapest in Hungary, in a valley surrounded on all sides by mountains or hills of considerable size, the smallest of them being about five to six hundred feet high, while the valley itself is a plain of considerable extent. The name of this valley is Orsod, and in it are contained only the bitter-water springs owned by the complainant, which cover an extent of more than one hundred acres of land. These springs are thus secluded from the outer world by a natural barrier which surrounds the valley on all sides, and neither the springs themselves, nor the geographical territory in which they are situated, have any connection with any other spring ter-

ritory in or near the City of Budapest (Record, p. 213). The springs number now about 112, and their water, which is of the same or substantially the same chemical composition, is led through a complicated system of pipes which can be separately opened and closed, into large subterranean cisterns from which the water is taken and bottled. Complainant's witness Kalman Saxlehner, a son of the complainant, has explained how the specific gravity of the water in the various springs differs at times owing to atmospheric conditions and how it is regularly measured from time to time so that by admitting the water of this or that spring, or a number of them to the large cistern, the same density of the bottled water is maintained. Every one of these wells is covered with a wooden house, the grounds are kept punctiliously clean, and by employing at all times the most improved sanitary methods for the preservation of the water and its excellent qualities, complainant and her deceased husband and predecessor in business, Andreas Saxlehner, have in the course of now more than thirty-five years built up a reputation for the "Hunyadi Janos" water which has made it a standard medicine prescribed by physicians and used by patients all over the world without question. In the course of these years complainant's business has gradually acquired a yearly output of about six million bottles which are sold all over the world. The books published at different times by the complainant describing the establishment, contain analyses made at different times by the most famous chemists of Europe and a large number of testimonials concerning the excellent quality of the water, coming from all parts of the globe and numbering nearly one thousand (see Complainant's Publications, Nos. 1 and 2, offered on p. 79, Record).

The adoption of the name and label.

The first of these springs was discovered by Andreas Saxlehner in the year 1862 and named by him

"*Hunyadi Spring*" (Complainant's Exhibit No. 18, Record, p. 241). Soon thereafter Saxlehner commenced to bottle the water of this spring and to sell it under the name "*Hunyadi Janos*" (Complainant's Exhibit No. 24, Record, p. 248). As a consequence of this trade the establishment itself also obtained the name of the "Hunyadi Janos Establishment" (Complainant's Exhibit No. 25, Record, p. 249), and the names "Hunyadi" and "Hunyadi Janos" became and remained from that time on inseparably connected with complainant's establishment and business (Complainant's Exhibit No. 26, Record, p. 250).

Andreas Saxlehner was not the first one in Hungary who bottled and sold any of the valuable bitter waters with which Hungary abounds. The waters of several other springs were then already sold in the market and recognized as a valuable commodity, one of them being called "Hildegard" and another being called "Franz Deak". For these waters different bottles and labels were used, wherefore Saxlehner adopted in conjunction with the distinctive name "Hunyadi Janos" also a distinctive label and capsule. A copy of this label is shown on the sheet offered in evidence on page 89 of the record and marked "Complainant's Exhibit Hunyadi Janos Labels Used in the United States."

From 1870 until 1877 Saxlehner exported his Hunyadi Janos water to the United States of America and sold it here in bottles bearing red and white labels of this description, all prominently showing the name "Hunyadi Janos" and the name of Andreas Saxlehner as proprietor of the springs. During this period, as early as 1870 and ever thereafter, the water was known in the United States under the short name of "*Hunyadi Water*" and that name became thoroughly identified with Saxlehner's establishment in the minds of our public. This is testified to by the witness Henry A. Cassebeer, a druggist (Record, pp. 174–176) and cor-

roborated by defendants' witness Paul Scher
dealer in mineral waters, who continued to pur
Saxlehner's water under the red and white
from parties in Europe and sell it in this co
even after the Apollinaris Co. had made its con
with Saxlehner to which we shall hereafter
It is further corroborated by the testimon
numerous physicians, among whom we will re
Dr. William A. Ewing, a practitioner of tw
seven years standing, and to Dr. George B. Fo
who was the Medical Health Commissione
New York City at the time when he test
Dr. Ewing testified that he did not re
ber the time when he was not fa
with the Hunyadi Janos Water; that it
very largely used and prescribed, and tha
usually prescribed it as "Hunyadi Water,"
being its colloquial name. In the 27 years
practice he had never become aware of any
water bearing the name "Hunyadi" or any a
tisement of any other "Hunyadi" waters (Re
pp. 189 to 191).

Dr. Fowler, in answer to the question how
he had known the "Hunyadi Janos" water,
fied that he remembered it distinctly; that he
uated in 1870, and it was used on the market
and he used it as it was used generally by the
fession and has used and prescribed it ever sinc
always thought that Hunyadi water and "Hu
Janos" were synonymous (Record, pp. 149-150

Defendant's witness Eisner knew Saxleh
Hunyadi Water and its labels in this country
1870 (R., p. 361).

We emphasize this year because the Circuit
erroneously came to the conclusion that the
had received the short name "Hunyadi" d
the period of sale by the Appollinaris Com
and could therefore lose it again by the doin
that same company (Record, p. 626). This evid
overlooked the fact that the name had attach

the water long before the company commenced to sell it.

Andreas Saxlehner caused this red and white label to be registered in the Trade-mark Register kept by the Chamber of Commerce and Industry at Budapest as early as the year 1873 (see Complainant's Exhibits Nos. 19, 20 and 22, Record, pp. 243, 244 and 245). It appears from these certificates that previously to this registration no trade-mark was entered in the Trade-mark Register in which the name or title "Hunyady" or "Hunyadi" or "Janos" was contained, and also that the same label was re-registered by the complainant, his widow, in the year 1890, under a law then passed. From the language of these certificates it appears that a trade-mark was registered by Saxlehner, *the title of which* was "Hunyadi Janos," and not that the name "Hunyadi Janos" as such was registered as a trade-mark. Such registration of words or names as trade-marks was not possible in Hungary until the year 1895, when an amendment to the trade-mark law of 1890 was passed, which amendment for the first time permitted the registration of names or words as trade-marks unaccompanied by any pictorial illustration (see "Complainant's Exhibit Hungarian Certificate as to Word Registrations," Record, p. 307). We shall see hereafter that from this lack of statutes covering the matter a mass of confusion and a most unfortunate condition of the law and practice in Hungary arose which has done incalculable harm to Saxlehner, and by reason of which for many years he could get no redress in Hungary against infringers.

Saxlehner's contract with the Apollinaris Company.

In the year 1876 Mr. Steinkopf, a director of the Apollinaris Company, Limited, of London, concluded a contract with Andreas Saxlehner by which the company agreed to purchase a certain quantity yearly and Saxlehner bound himself for the term of

ten years not to sell to anybody else in the territory defined in the contract his "Hunyadi Janos" water, which territory covered Great Britain, the United States and other transmarine countries, excepting Smyrna. This contract was soon thereafter extended for further fifteen years, beginning with the 1st of January, 1886. By a peculiar translation from the German original it is stated that Saxlehner "abandoned" to the Apollinaris Company the exclusive sale of his natural "Hunyadi Janos" bitter water in said territory for such term of years (see Complainant's Exhibit Apollinaris Contract, Record, pp. 237-240). The company became in no manner or way an agent for Saxlehner in the legal sense of the term, but their relations were entirely that of vendor and purchaser, the company agreeing to purchase at least 100,000 bottles yearly until 1878, and at least 150,000 bottles thereafter at a stated price. In addition to this Saxlehner agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. The sum and substance of this agreement is of a negative character rather, namely, that Saxlehner bound himself not to sell to anybody else in the territory defined in the contract for the period of time provided therein. He could of course not prevent any of his purchasers in Europe from selling the water purchased by them, in the United States of America or any other parts of the contract territory and could not grant any sole rights to the company, but only protect it against direct sales from his establishment to their customers in the United States. There is nothing said in the contract about the label to be employed on the bottles sold to the Apollinaris Company, except that the company's name and address as sole importer should be printed thereon. This was done, but at the same time the same label also distinctly referred to Andreas Saxlehner as the owner of the spring, and the public were thus advised that they bought Saxlehner's water imported here by the Apollinaris Company.

Saxlehner's Red and Blue Label.

Shortly after the making of this contract, it appears that Saxlehner changed the color of his label, which theretofore had been red and white, to red and blue, evidently for the purpose of distinguishing the water bottled by him for sale to the Apollinaris Company from the water sold by him to other parties in Europe, and from this time on, about 1877, all the water shipped to the United States was shipped under this red and blue label. The successive agents of the Apollinaris Company in New York were examined as witnesses for the complainant and testified that from the beginning the water had been commonly bought and sold as "Hunyadi Water," and this continued from 1876 to the expiration of the contract in 1896. This is shown by the testimony of Seymour McCullagh (Record, pp. 122–123) and Robert Pearce (Record, pp. 88–92). Only slight changes were made in this red and blue label indicating the several sub-agents, and since the termination of the contract, by notice from the company to the complainant in March, 1896, the complainant has continued to sell the water under substantially the same red and blue label in this country, having substituted the name of the firm of Andreas Saxlehner as proprietor on the top of the label instead of the name of the company as importer of the water.

The sheet of labels marked "Complainant's Exhibit Hunyadi Janos Labels Used in the United States" shows all the various labels used by the complainant and the Apollinaris Company here.

A glance at this sheet shows slight differences of shading in the red and blue colors of the Hunyadi Janos labels, the centre field sometimes being of a more or less glaring red and in other cases almost brown, while the tints of blue also vary from a rather dark to a very light blue. This has been testified to as being accidental. Attention should be called to it because defendants' main witness, Eisner,

and defendants' counsel made the point that the centre field of defendants' label is of a more brownish color and claim that this distinguishes the two labels sufficiently. Upon comparison the Court will, however, find that some of defendants' labels show substantially the same red centre field, and on the whole the distinction is unsubstantial.

In addition to this red and blue label the complainant since the year 1890 has been in the habit of pasting a narrow strip of blue paper containing the words "Andreas Saxlehner, Budapest, Proprietor of the Spring; Bottled in Hungary" upon that space left between the two ends of the red and blue label, as will appear by an examination of the sheet containing these labels presented to the Court. Attention should be called to this because even in these slight particulars the defendant has closely followed the practice of complainant with reference to the labels and likewise added to its blue and red label a similar longitudinal strip (Record, pp. 542-543; also pp. 399, 400). The inscription on this strip which was used since 1890 on complainant's water further emphasized the fact that it was Saxlehner's water, and not the water of any spring owned by the Apollinaris Company, which was offered to the public in the United States.

THE BLUE AND RED LABEL ALWAYS WAS AND REMAINED THE PROPERTY OF ANDREAS SAXLEHNER AND THE COMPLAINANT. The Court will find that Saxlehner first registered his red and white label in Hungary in 1873, and thereafter from time to time re-registered the same, and also the red and blue label used in the United States. In every instance these labels were registered by and on behalf of Saxlehner, and claimed to be the property of the registrant (Record, pp. 245, 246 and 247). It also appears thereby specifically that the label used by the Apollinaris Company in the United States, and bearing the name of that company as sole exporters of the water, was registered as complainant's label and trade-mark in Budapest in the

year 1890, in accordance with the law passed in that year in Hungary (Record, p. 247).

That Saxlehner claimed this red and blue label to be his property is further evidenced by the fact that when he registered his trade-mark "Hunyadi Janos" in the Patent Office of the United States on September 11, 1877, he described the label upon which it was used, stating that the colors of said label might be either red and white or red and blue, as shown in the accompanying labels, and specifically stated that by thus registering his trade-mark "Hunyadi Janos" he did not mean to curtail, relinquish or waive his right to the exclusive use of the label as a whole (Record, p. 616).

There is no suggestion in any of the papers or in the contract with the Apollinaris Company, that the company had any right or title to the word "Hunyadi" or to the label. Saxlehner sold his water, bottled and labeled by him at Budapest, to the Apollinaris Company, which resold the same in the United States, and whatever right the company had to the use of the label was confined to its use on such water as had been sold to it by Saxlehner with such labels. All its rights ended with the termination of its contract, and complainant thenceforth continued to use the same label, having erased thereon the name of the company as exporters. Upon the red part of the label used in the company's territory there was a warning signed by Andreas Saxlehner that "Imita-
"tion of this water, or of the label, or of the cap-
"sule, will be the subject of legal proceedings at the
"instance of the Apollinaris Company;" but the company, in its contract, did not agree to institute such proceedings.

"Hunyadi" registered by Saxlehner as a trade-mark in the United States Patent Office in 1887.

In order to further protect his trade-mark rights in the United States Saxlehner caused the name

"Hunyadi" to be registered separate from the word "Janos" in the United States Patent Office, as a trade-mark, on April 5, 1887, having made application for such registration November 12, 1886. In the statement accompanying this registration he was again careful to refer to the red and white or red and blue label upon which said trademark was used by him, and to repeat the statement that he did not in anywise intend by said registration to abridge his right to the exclusive use of said label as a whole or to any of its features (Record, pp. 310-311).

Saxlehner's efforts to obtain protection against infringers in Hungary.

There is no evidence in the case that previous to the year 1877 anybody else sold bitter water in Hungary employing the name "Hunyadi" as a part of the name of the water, but previously thereto an attempt had been made by one Ignatius Markus to obtain from the authorities permission to name a spring discovered by him about the year 1872 by the name "Hunyadi Matyas." Ignatius Markus was not the proprietor of this spring, but the lessee of a plot of ground on which he dug or discovered the spring. He made a petition to the Town Council of the City of Buda praying for a license to work this spring under the name "Hunyadi Matyas" (Record, pp. 262-263). Upon this petition the Town Physician, under direction of the Town Council, made a report concerning the quality of the water found, which was unobjectionable, but referred in his report to a protest made by Mr. Saxlehner, the owner of the "Hunyadi Janos" spring, against the use of the name "Hunyadi" by Markus on the ground of a threatened injury to his trade (Record, pp. 263-264). The Town Council thereupon rendered a decision sustaining Saxlehner's protest, in which the fact is stated that even at that time Sax-

lehner's water was generally known abroad and at home under the name of "Hunyadi," and that confusion in trade would arise by the use of the name "Hunyadi Matyas" (Record, pp. 265-266). Marcus appealed from this decision to the Minister of Agriculture, who reversed the decision, holding in substance that the two names "Hunyadi Janos" and "Hunyadi Matyas" were sufficiently distinct, and that it sufficiently appeared that the waters of the springs were substantially of the same quality, and that therefore no damage could ensue by using either one or the other (Record, pp. 266-267). The Minister likewise stated in his decision that the application had nothing to do with any trade-mark protection, because the names were sufficiently different, and because Saxlehner's name and label were not registered. It does not appear that Markus had presented any label to the authorities, nor does it appear that he ever sold any water or made use of the permission granted to him by the Minister of Agriculture. As a matter of fact, he never seems to have obtained the license from the local authorities, which the Minister had decided should not be withheld from him, and it is likewise certified by proper authority that the owner of the ground on which this spring was discovered, one Reso Ensel, never obtained any license to operate such a spring, which would have been a necessary condition for starting such a trade in Hungary (Record, pp. 270-271).

In the year 1876, however, the firm of Mattoni & Wille became the purchasers of this plot and several other adjoining plots containing springs, and in that year registered a separate trade mark and name for each of the six springs which they then acquired, and among these was a trade-mark bearing the name "Hunyadi Matyas" spring. Another of these springs bore the name "Franz Deak." Mattoni & Wille, commencing about 1877, sold in Hungary the waters of these six different springs, claiming in a pamphlet published by them certain specific differ-

ences of composition of the various waters which recommended them for different purposes (Record, pp. 163–164). We shall show hereafter that the water sold under the name "Hunyady Matyas" in the United States by the defendants does not come from the spring named "Hunyady Matyas" by Mattoni & Wille in the year 1877, but from their spring called "Franz Deak," and that this spring was named "Hunyady Matyas No. 2" by the defendant and Mattoni & Wille about the year 1890 for the purpose of enabling the defendant to successfully trade in the United States upon the name and reputation of complainant's "Hunyadi" water.

The decision of the Hungarian Minister of Agriculture rendered in 1873 seems to have encouraged Mattoni & Wille and also several owners of other springs near Budapest to thereafter adopt names for their waters containing the word "Hunyadi" in some connection or other, and also labels which more or less closely imitated the red and white label used by Saxlehner. Saxlehner made in 1887 another attempt to stop the employment of the name "Hunyadi" when applied to a water sold in Hungary and called "Hunyadi Josef" (Record, p. 199). He had repeatedly protested against the use of the name "Hunyadi" by other parties, but was unable to prevent it, and also unable to prevent the use of colorable imitations of his red and white label in Hungary on account of a lack of appropriate statutes upon the subject (Record, pp. 199–201). He died in the year 1889 without having been able to enforce his exclusive rights in Hungary.

It appears that there was a criminal statute in Hungary forbidding the use of counterfeited trade-marks, but the courts and authorities were not yet alive to the fact that piracy of trade-marks by counterfeits is seldom resorted to, but its most dangerous form consists in the use of similar labels, insignia and names. When the complainant took over the business of her pre-

decessor, a statute was passed in Hungary in the year 1890, which contained more stringent provisions and made a prosecution of the several imitators possible, and the complainant at once took advantage of this and instituted a large litigation against all infringers in 1891, to which the witness Kalman Saxlehner has referred. His testimony upon the condition of the law in Hungary was objected to as incompetent, but it appears sufficiently from the context of the decisions against Mattoni & Wille of the years 1894 and 1896, and from the various other decisions of the Hungarian Minister of Commerce against other infringers, which have all been offered in evidence, that the relief granted to the complainant by those decisions could not be had previous to the laws of the years 1890 and 1895. Indeed, in some of these decisions it is set forth that previous to those years some other decision had been made by another Minister (undoubtedly referring to the Markus decision of 1873), which, however, is criticised as not in point, because made by an administrative tribunal in a controversy not involving trade-mark or label rights. This criticism was quite correct because, as we have already shown, the application of Markus was not for the registration of a trade-mark, but for a license to operate a spring and the incidental reference to the name was an *obiter dictum* (see Complainant's Exhibits Hunyadi Matyas Decision of 1894, Record, p. 257; Hunyadi Matyas Decision of 1896, Record, p. 258; Hunyadi Laszlo Decree, Record, p. 276; Uj Hunyadi Decree, Record, p. 294; Hunyadi Lajos Decree, Record, p. 305).

Finally, it also appears by the certificate "Complainant's Exhibit Hungarian Certificate as to Word Registrations" that until the year 1895 neither the complainant nor Andreas Saxlehner could obtain legal protection for the trade-mark or name "Hunyadi" or "Hunyadi Janos" in Hungary when used alone, but that until then protection was given only to pictorial trade-marks (R., p. 307).

It appears from the foregoing that Saxlehner until his death in the year 1889 was not in a position to enforce his rights in Hungary, not by reason of any fault of his own, but on account of the primitive and unsatisfactory condition of the laws of Hungary. While this was the case, he did everything that was in his power to get whatever protection he could obtain by registering and re-registering his labels, both in Hungary and in other countries, and never failed to assert his exclusive rights.

We have already shown above, that in the year 1890 the complainant again registered her various labels, including also the red and blue "Hunyadi Janos" label as then used in the United States, in Hungary, in pursuance of the law passed in 1890, providing for better protection against infringement of trade-marks. Very soon after the statute of 1890 had been passed, the complainant sent a formal notice to Mattoni & Wille that she protested against the use of the label employed by them for their "Hunyadi Matyas" Water (Record, pp. 275–276). This notice was dated on July 16, 1891, and demanded the cancellation of all the trade-marks used by that firm of which complainant complained, and comprising also the label for "Hunyadi Matyas."

Right after this, still in the year 1891, the complainant commenced a suit against the firm of Mattoni & Wille, and against the other infringers of her trade-mark and label, among whom were also the owners of the Hunyadi Laszlo spring whose waters are likewise sold by the defendant Eisner & Mendelson Company and mentioned in the bill of complaint (Record, p. 207). The printed bill of complaint in that suit which has been produced by Kalman Saxlehner comprises some three hundred pages; it was directed against all the infringers of Saxlehner's labels and must have required a stupendous amount of work on the part of Saxlehner's attorney (see Complainant's Exhibit Complaint against Imitators, Record, p. 208). Kalman Saxlehner testified: "After "the notice was sent in 1891 our lawyer at once

"commenced to collect the material and this law "suit was filed. It was a tremendous work; the "bill of complaint, I think, alone was three hun- "dred and some pages and about four or five hun- "dred exhibits. It was directed against all of the "people and owners of other mineral water springs "who used the name Hunyadi. Now, when the "lawsuit was filed, after some time it was rejected "for a technical mistake. Our lawyer took all the "suits against eight or ten people or more than that "together and the Minister asked that every one "should be sued separately and this gave our "lawyer a great deal of work which took "about a year or so until he separated them "and filed each lawsuit or complaint separately "1893" (Record, pp. 207-8). The suit against Mattoni & Wille which was thereupon started separately by Saxlehner's attorney, to cancel the Hunyady Matyas label and other labels used by them, came to a final determination in the year 1894 by a decree in favor of the complainant, pursuant to which Mattoni & Wille's various "Hunyady Matyas" labels and other labels imitating those of Saxlehner were canceled by the Hungarian Minister of Commerce, the highest authority in Hungary in such matters. This decree is dated November 26, 1894 (Record, p. 257).

A similar favorable decree was obtained by complainant in her suit brought against "Compagnie Générale d'eaux Minerales et de Bains de Mer" which furnished to the defendant the Eisner & Mendelson Company the "Hunyadi Laszlo" Water sold by the latter in this country. In consequence of this decree the defendant's Hunyadi Laszlo label was likewise canceled in Hungary (see Complainant's Exhibit Hunyadi Laszlo Decree, Record pp. 276-277). It was rendered May 25, 1894.

The sale of the Hunyadi Laszlo Water was practically stopped by the obtaining of this decree, not only in Hungary but also in the United States, but not so that of the Hunyady Matyas Water. In spite

of the decree of November 26, 1894, Mattoni & Wille still continued to use the name "Hunyady Matyas" separate from the label in Hungary, and exported the water as before to the Eisner & Mendelson Co. with the red and blue labels which were not registered in Hungary.

Another remedial act was, however, passed in Hungary in the year 1895, which provided for the registration of words or names as trade-marks, and complainant at once taking advantage of this, registered her name "Hunyadi" as a word trade-mark, and in the same year instituted another suit against Mattoni & Wille, which came to a decision in 1896. The decree of the Hungarian Minister of Commerce, "Complainant's Exhibit Hunyady Matyas Decision of 1896." (Record, pp. 258-262), was the outcome of this second litigation, and FINALLY DETERMINED FOR AUSTRO-HUNGARY THE RIGHTS OF COMPLAINANT TO THE SOLE USE OF THE NAME "HUNYADI" AS A TRADE-MARK. Similar decisions were rendered in the year 1896 in her favor against the other imitators of her name, and the Court will find an enumeration of these various decisions in Saxlehner's Circular of November, 1896, which was then sent out to the trade in Hungary and elsewhere (Record, pp. 290-293). Among the trade-marks enumerated in this circular is that of "Hunyadi Josef," against which Saxlehner had been unsuccessful in 1887, but succeeded in 1896; also that of "Hunyadi Lajos," which is the water imported by the defendant Alexander Nielsen in the Case No. 716, and also the mark "Uj Hunyadi," registered by the Uj Hunyadi Company, which was a creature of the Apollinaris Company, Limited. The decree against the Uj Hunyadi Company is the longest and most circumstantial of all these decrees, and shows that the Apollinaris Company, through the Uj Hunyadi Company, waged a more bitter fight against complainant than any other of the competing concerns. Every imaginable defense to complainant's claim is discussed at great length in that final decree, which,

together with the other decrees rendered at the same time, ended complainant's fight with the infringers which had practically lasted continuously from the year 1891 until October, 1896.

That these litigations were not the only steps which complainant took during that period in order to establish and protect her rights will be shown hereafter.

The suits of the Apollinaris Company against infringers in the United States in the years 1886-1888.

The company went on in the business of selling the "Hunyadi Janos" water in the United States without a competitor of importance, excepting one Paul Scherer, who imported Saxlehner's "Hunyadi Janos" water under the red and white label from Europe, buying it from parties who had purchased it from Saxlehner. The Apollinaris Company instituted a suit against Scherer to enjoin him on the ground that it had an exclusive right to sell Saxlehner's water in the United States, but its claims could not be substantiated and its suit was dismissed. This suit was decided on March 16, 1886, and the decision is found in Vol. 27, Fed. Rep., pp. 18-22. This decision emphasized the point that by the contract between Saxlehner and the Apollinaris Company no territorial title to the products of the spring was granted. The Court also found that there was no breach of covenant on the part of Saxlehner; but that, on the contrary, he did all that was in his power to carry out the agreement between himself and the Apollinaris Company.

In the same year, however, infringements by the sale of simulated waters came up. The Circuit Court found as follows with reference to this matter:

> "In 1886, Mattoni & Wille, of Budapest, consigned to one Andres, in New York, 121

cases of their Hunyadi Matyas Bitter Water. This firm had bought four springs in Budapest, one of their purchases being the original Markus spring, and in 1877 they registered in Hungary four trade-marks for four several wells, to wit, 'Szcihenyi,' 'Deak,' 'Sz Istvan' and 'Hunyadi Matyas.' Ignatz Ungar & Son became in 1880 the owners of a Budapest spring which they called 'Hunyadi Arpad' and registered the name in Hungary, and in 1886 began to sell the water from it in New York City, through Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels; the Matyas bearing the words 'Hunyadi-Mathias-Quelle' in small print, was put up in red and white labels. Suits were promptly, and before Andres had an opportunity to sell his lot, commenced in 1886 in the United States Circuit Court for this district by the Apollinaris Company against these agents to enjoin them against the use of the trade name 'Hunyadi' and of the labels, but were withdrawn on the ground of want of jurisdiction, and two suits, one against Andres and the other against Ungar, were brought by the Apollinaris Company in the Supreme Court, in the City of New York. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when on application of the defendant in the Ungar case, the injunction in that suit was dissolved, no one appearing in opposition, and soon after the injunction in the Andres suit was dissolved without objection and the suit was voluntarily discontinued.

"An attempt was made by the Eisner & Mendelson Company to show that the Apollinaris Company notified Saxlehner of the pendency of the motion to dissolve the injunction in the Ungar case and his refusal to assist in the opposition, but the offered testimony was merely hearsay and was inadmissible."

Record, pp. 622-623.

The evidence referred to by the Court consisted of translations of portions of alleged letters written by the Apollinaris Company to Saxlehner in the year

1888, which were objected to as incompetent. Thereupon defendants' counsel offered in evidence an affidavit made by a Mr. Prince, manager of the Apollinaris Company in London, in which these letters were referred to. This was also offered in evidence against the objection of complainant's counsel and has been reprinted in full on pages 597–611 Record. The Court will find the testimony and offer objected to on pages 530 to 533 of the Record.

Beyond this attempt there is no evidence in the case whatever that Saxlehner had any knowledge of the proceedings brought by the Apollinaris Company in this country against Andres and Ungar. The suits were not brought in the name of Andreas Saxlehner, but in the name of the Apollinaris Company, and the whole tenor of the bills of complaint in these two cases shows that the Apollinaris Company believed it had a grant of a right from Saxlehner under which it could maintain a suit against infringers at its own instance and for its own benefit (Record, pp. 566–570). The main defense set up by defendant Andres was that his principals in Hungary, to wit, Mattoni & Wille, who had consigned to him the "Hunyadi Matyas" Water for sale, took said water from a spring in Hungary which for "many years prior to 1877 and since then" had been known by the name of "Hunyady Matyas"; that its owner always had as good a right to that name as a trade-mark as the owner of the "Hunyadi Janos" spring, or his assigns or grantees ever had to the use of that name, and that Mattoni & Wille had obtained by royal grant permission to put all their different Hungarian Bitter Waters on the market under the general name of "Ofner Royal Bitter Water," under the condition, however, that they would print upon their labels on bottles which contained waters from said "Hunyady Matyas" spring, the name "Hunyady Matyas" (Record, pp. 572–573).

The papers in the litigation of the Apollinaris Company *vs.* Ungar likewise show that the main de-

fense relied upon by Ungar was the point that Ungar had the right under the laws of Hungary to sell "Hunyadi Arpad" water everywhere under that name. Ungar cited the decision adverse to Saxlehner's claims made by the Minister of Agriculture in 1873, upon the petition of Ignatius Markus and claimed in numerous affidavits that Saxlehner had no right to proceed against or complain of Ungar in Hungary on the ground of any imitation of his trade-mark or label (Record, pp. 578–579). Both defendants therefore relied mainly upon the fact, which at that time could not be contested, that in Hungary it was lawful, because not forbidden, to use the simulating "Hunyady Matyas" and "Hunyadi Arpad" labels and names, and insisted that the owners of these springs should have the right to use the same names and labels anywhere else; in fact this latter contention was certified to by an United States Consul at Budapest (Record, p. 578).

We have above given the reasons for our contention that the affidavit of Prince and the testimony of Haldenstein concerning any alleged correspondence between the Apollinaris Company and Saxlehner in the year 1888 should be excluded from consideration. If for any reason they should deserve consideration, the court will find that in one of these letters the Apollinaris Company suggested to Saxlehner, that in view of his failure to get redress against the "Hunyadi Josef" water in Hungary in the year 1887, a prosecution of his rights in the United States would be attended with very doubtful result. The company said:

> "The recently published decision of the Hungarian Minister of Commerce given against you in your case against Hunyadi Josef confirms us in the opinion which we had formed more than a year ago and mentioned to you in our letter of the 8th March, 1887, that we cannot hope to succeed in preventing the sale of other waters in America under names of which the word 'Hunyadi' forms part. We do not therefore intend to oppose

the dissolution of the injunction" (Record, p. 605).

We therefore maintain that the record of this case either is devoid of any proof that Saxlehner had anything to do with or any knowledge of the suits instituted by the Apollinaris Company in 1886–1888, or that, if it does show knowledge of such suits, he was advised by the company which sold his water in the United States that it saw no possibility of protecting his trade-mark rights in this country in view of the unfortunate condition of the law in Hungary.

Neither the complainant nor her husband were ever in the United States. They resided continuously in Budapest, and had, until 1895, no agent or representative in the United States. Kalman Saxlehner, a son of complainant, first learned of the sale of the imitation Hunyadi waters and their blue and red labels in this country when he came to this country in 1895. He had been active in the business at Budapest since 1888, and since 1893 had been initiated into its matters of importance, but never saw defendants' labels until he came here (Record, pp. 73-75; also 115-117).

The Apollinaris Company schemed to deprive Saxlehner of his trade-mark rights.

In or about the year 1880 the Apollinaris Company registered in England the trade-mark "Hunyadi Janos" in its own name as proprietor and refused to cancel this registration or transfer it to Saxlehner when he discovered this fact about 1883. Saxlehner was compelled to commence a litigation against the Apollinaris Company in England to cause the cancellation of this illegal registration, but such complications followed thereafter that it was as a result of another suit brought by the Vichy Company that finally Saxlehner's mark was restored to him (Record, p. 206). In

1886 or 1887 the Apollinaris Co. purchased a spring of bitter-water in Hungary known as the "Ofen Rakoczy" spring and held this spring for the purpose of bringing its waters into the market under the name of a "New Hunyadi" water at some time when it might find it profitable to end the contract with Saxlehner. In order to gradually transfer the the reputation of the "Hunyadi" water to its own business, it adopted in the year 1887 a small yellow label of diamond shape which it pasted upon the labels of the "Hunyadi Janos" water. This label contained the words: "The diamond is the trade-"mark of the Apollinaris Company, Limited, and "is meant *only* to indicate that mineral waters so "marked are sold by the Apollinaris Company, "Limited."

In itself this label was harmless, but that it was adopted for the purpose of gradually acquiring the benefits of the reputation enjoyed by the Hunyadi water and to serve as a bridge by means of which the reputation could be transferred to the bitter-water of the "Ofen Rakoczy" spring appears from a letter of the company to one of its agents written in 1887, and was fully acknowledged by Mr. Prince in the suit of Mrs. Saxlehner against the Apollinaris Company in England in 1896-7 (Record, pp. 202-205).

In the year 1891 complainant, discovering the use of this diamond label in England, sought to enjoin the Apollinaris Company from its use on the "Hunyadi Janos" water, but failed in this attempt, the English court not finding anything illegal in such use (Record, p. 216).

In the United States the agents of the Apollinaris Company, Charles Graef & Co., had published (without the knowledge or consent of Saxlehner) in the year 1889 a circular in which it stated:

> "The Apollinaris Company, Limited, London, beg to announce that as numerous aperient waters are offered to the public under names of which the word 'Hunyadi' forms a

part, they have now adopted an additional label comprising their registered trade-mark of selection, which consists of a red diamond. This label will henceforth also serve to distinguish the Hungarian aperient water sold by the company from all other aperient waters."

Record, p. 623.

From that time on and until the cancellation of the contract in 1896, the company placed upon the bottles of Hunyadi Janos water, which it sold in this country, the red diamond label and in the year 1893 (again without Saxlehner's knowledge) published a circular through Graef & Co., its agents, as follows:

"Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced the Hunyadi Janos water, the proprietor in Budapest of the springs having entrusted to them, for a term of years, still unexpired, the sole sale of this water in England and in all transmarine places. Hunyadi Janos water having become very popular, quite a number of other waters are now offered for sale, under names of which the word 'Hunyadi' forms part, and in bottles and with labels closely resembling in appearance and color those long used for Hunyadi Janos water."

"The word 'Hunyadi' having become a general name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Company affixed to the bottles of Hunyadi Janos, the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited."

In March, 1896, when the contract expired, the company endeavored to carry out its scheme, conceived about 1886 or 1887, and suddenly threw upon the market large quantities of bitter water coming

from the "Ofen Rakoczy" spring under the newly given name of "*Apenta, from the Uj Hunyadi Springs at Budapest,*" adding thereto the red diamond sign formerly used by the company on Saxlehner's water. "Uj Hunyadi" means "New Hunyadi." In consequence of this attempt to usurp the right to the name "Hunyadi," complainant brought a suit against the company in the Court of Chancery in England in 1896, and in 1897, after a trial on the merits, obtained a perpetual injunction against the Apollinaris Company forbidding the further use of the name "Hunyadi" upon any but Saxlehner's water. A similar suit was brought by complainant against Charles Graef & Co., the agents of the Apollinaris Company in this country, but that controversy is now at an end, the company having withdrawn the name "Hunyadi" from its labels (Record, pp. 280, 282, also 204, 205).

It also appears that Saxlehner and the Apollinaris Co. were almost constantly in litigation with another in Austria and elsewhere, and their relations were always strained. It is not claimed that complainant was apprised of the issuing of the company's circulars of 1889 and 1893 in the United States, which were evidently a part of Graef & Co.'s scheme to spoil her business for its benefit.

Defendants' labels were designed to deceive the public.

The Circuit Court found as a fact, which was clearly proved, that defendants' manager, Moritz Eisner, "intentionally simulated the Saxlehner "United States label for the purpose of obtaining "by means of the simulation, a part of the good-"will which the Janos water had gained. This "'Matyas Spring No. 2' was not the original "Matyas spring, in regard to which Markus had his "litigation in 1873, but was another spring called "the 'Franz Deak' spring which Mattoni & Wille "bought in 1876 from Michael Ivanyi and wife,

"and was the spring registered in 1877 under the "name 'Deak'" (Record, p. 624).

A comparison of the labels on complainant's bottles and those of the "Hunyadi Matyas" bottles shows the evident intention to imitate the colors and design of the former. Eisner himself had known the "Hunyadi Janos" Water in the United States since 1870 and had sold and handled it and was well acquainted with its blue and red label. He also knew that other Hungarian bitter waters like the "Ofen Rakoczy," the "Franz Josef" and others were sold under other labels not like those of Saxlehner (Record, pp. 359-366).

In the year 1889 the Eisner & Mendelson Company made a contract with Heinrich Mattoni, the owner of the springs, the water of which had been sold by Mattoni & Wille, by which the company obtained the sole agency for the United States and Canada for the sale of the bitter waters which he owned, for the term of twenty years from September 1, 1889. Eisner, who acted for the Eisner & Mendelson Company, saw half a dozen different Mattoni labels, but devised a new one for the American market and imported some twenty thousand bottles in 1889 and 1890 under the name "Royal Hungarian Bitter Water" upon a red and white label (Record, p. 623) As a witness Eisner tried to convey the impression that this contract had been merely a provisional contract made until his company could determine *which spring* it wanted to take hold of, but this contention is in conflict with the contract itself, which was a definite agreement for twenty years, comprising all the various springs of Mattoni & Wille by whatever names they were called. The true reason for the subsequent change of the programme was that upon his return to the United States he found that "Hunyadi Arpad" Water was sold under a blue and red label in the United States and had a large sale on account of the name "Hunyadi" on the bottles and the

blue and red colors of the label, successfully imitating Saxlehner's well known "Hunyadi Janos" Water. By adopting a similar red and blue label, and using the name "Hunyadi Matyas" upon it, he could at once secure a ready sale which the water under the first label had not commanded. The process was simple and he did it. That the water was and remained the same is shown by the analysis on both labels successively used by him, which is the same. This also explains why, in possession of a contract for ALL the springs, he suddenly threw overboard all excepting one, and in the year 1890 leased that spring from Mattoni for a term of years, and called it "Hunyadi Matyas No. 2." The original Hunyadi Matyas Spring was then either dried up or not in operation, and Eisner had to resort to this spring whose waters had formerly been on the market as "Franz Deak," and thereafter as "Mattoni's Royal Hungarian Bitter Water." This was proved by the certificate "Hunyadi Matyas Spring" (Record, p. 273), and also through the evidence of Dr. Endemann, the chemist, who showed that the analysis of defendants' so-called Hunyadi Matyas Water was totally different from the analysis of the original Hunyadi Matyas Spring (Record, pp. 160–165). This was also admitted by the witness Eisner (Record, p. 380). Defendant was unable to produce any sort of license, certificate or decision or document showing when and where this simulated Hunyadi Matyas Spring No. 2 was discovered, licensed or put in operation. He tried to justify the name of this water by showing documents which related to the original Hunyadi Matyas Spring and tried to make the Court believe that this spring was the spring from which defendant obtained its water. Finally, the witness Eisner contended that he adopted this blue and red label for the same water for the purpose of controlling the LABEL for the American market entirely. It is easy to see the true reason for adopting this label in place of that

theretofore used, which was harmless but also ineffective. Dr. Endemann also showed by the analysis of the water and that of the "Franz Deak" water, that the water now sold by the defendants under the name of "Hunyadi Matyas" was identical with that coming from the old "Franz Deak" spring (Record, pp. 165–166), and this was corroborated by the fact that the first agent of Mattoni & Wille received such "Franz Deak" labels from them for the purpose of pasting them on the bottles when he was stopped in the sale of the first lot of "Hunyadi Matyas" labels sent to this country. The analysis on those labels is identical with the analysis of the Franz Deak spring published in Mattoni's Pamphlet of 1878 (Record, p. 293, also pp 272–273). Finally the record evidence from the Hungarian Register also showed that this pretended Hunyadi Matyas No. 2 spring was situated on the plot marked 10335*a*, and no other than the old Franz Deak spring (R. pp. 272 and 273).

In connection with the introduction of this so-called "Hunyadi Matyas" Water in 1890 and thereafter, defendants resorted to the publication of falsified advertisements or certificates relating to the water, and which were probably written originally for the "Franz Deak" spring, but changed the name so as to apply them to the "Hunyadi Matyas" spring. These testimonials, some of which date from the years 1862, 1865, 1868 and 1872, could not possibly have been given for the "Hunyadi Matyas" Water or the "Hunyadi Matyas" spring, because that spring was only discovered and named in 1873. These false testimonials accompanied almost every larger advertisement of the defendant and were reproduced in thousands of copies (Record, pp. 324–325, and pp. 391–394).

To emphasize the falsehood of the matter, defendant published a glaring advertisement, stating in as prominent print as could be procured that its "Hunyadi" water was—

stating also that it had hundreds of other testimonials from the most prominent American and European physicians; that defendants' "Hunyadi Matyas" spring is the oldest of the Hunyadi springs (Record, pp. 406-407); that it had been favorably known on the Continent for more than thirty years past (Record, pp. 404-405). This might have been true if stated of the "Franz Deak" spring, but was stated by defendant as applying to the pretended "Hunyadi Matyas" spring, to show that this was the original "Hunyadi."

Cards of the shape of the label were printed with the tempting blue and red label on one side thereof, and a garbled picture, falsely representing a geographical connection between the "Hunyadi Janos," the "Hunyadi Arpad" and the "Hunyadi Matyas" springs on the other side, together with the untrue analysis of the so called "Hunyadi Matyas" water, and the statement that the latter is the strongest of all Hunyadi waters, while in fact it was much weaker than the others. Large quantities of these misleading statements were circulated among the trade. It is characteristic of the methods of advertising resorted to by defendant, that all publications which have been presented, with hardly any exception, were merely publications in trade papers acquainting wholesale dealers and retail druggists with the fact that the defendant was in a position to furnish the trade with a water having a label so closely similar to that of Saxlehner, that its differences could only be detected upon careful scrutiny, and with a water which by reason of the name "Hunyadi" on the bottle could be palmed off upon an innocent public as and for "Hunyadi" water. No attempt, however, was made to make the water known among the purchasing public. That such advertising could not establish any demand among the purchasing public for "Hunyadi Matyas" water goes without saying. It was merely an invitation

to the unscrupulous to take advantage of the similarity of the name and label. Such practices have been frequently denounced by the Courts.

Pillsbury vs. *Pillsbury-Washburn Flour Mills Co.*, 64 *F. R.*, 841, 849.

Eisner cannot plead ignorance of Saxlehner's prior rights. He knew that Saxlehner was the first who adopted the name "Hunyadi," that he was the first to register his label in Hungary (Record, p. 383), that Saxlehner's water had been in the market of the United States for twenty years as the only "Hunyadi" there known, and that the red and blue label had been used by him for ten years before any imitation appeared in the market. He knew that he was committing a fraud, but trusted that Saxlehner could not reach him. Andres had testified that Mattoni & Wille considered the "Hunyadi Matyas" label as the one which had "the most chance "in the United States, because it bore the "name 'Hunyadi,' and there it was considered to "be very salable, because the name Hunyadi was "known all over the United States." That was in 1886 (Record, p. 222). This opportunity was improved by Eisner by adopting in addition the red and blue label in further imitation of the "Hunyadi Janos" Water.

Saxlehner never intended to abandon the name or label.

The evidence in the case shows that instead of abandoning, Saxlehner asserted his rights wherever he could. When in his first unsuccessful attempt to formally protest in 1873, it was suggested by the Hungarian Minister that his label was not registered, he immediately registered it as a trade-mark, and thereby secured the first registration of any label for bitter waters in Hungary (Record, p, 243). In 1877 he registered the Hunyadi Janos trade-

mark in the United States Patent Office (Record, p. 616).

In 1884 he registered in Hungary the three labels used on the bottles sold by him to the Apollinaris Company (Record, p. 247).

In 1887 he instituted his unsuccessful suit in Hungary against the Hunyadi Josef Water.

In the same year he registered the word "Hunyadi" as his trade-mark in the United States Patent Office.

Upon Saxlehner's death in 1889 the complainant caused his trade-marks to be transferred to her on the registry in Hungary (Record, p. 246).

In 1890 complainant re-registered the three labels used upon the bottles for the Apollinaris Co. (Record, p. 247).

In 1891 complainant notified Mattoni & Wille of her intention to sue and instituted suit against all the infringers in Hungary (Record, pp. 275-276). From 1891 to October 1896, complainant conducted litigations against all the infringing waters in Hungary and during that time, in 1895, seized the first chance which she had in Hungary to register the name "Hunyadi" there as her trade-mark.

During the same time she successfully protested in Germany against Mattoni & Wille's attempted registration of Hunyadi Matyas (Record, p. 211), and tried to prevent the use of the red diamond mark in England, but without success (R., p. 216).

In June, 1896, she had also instituted her suit against the Apollinaris Company in England and obtained a final injunction against the illegal use of the name Hunyadi after a trial upon the merits in February, 1897 (Record, pp. 280-282).

In October, 1896, upon the termination of the Hungarian suits, notice to stop was sent to the defendant the Eisner & Mendelson Company and other infringers in the United States (Record, p. 252), and the present suits were instituted in April, 1897. Previous to that month complainant had instituted several suits against retailers and obtained evidence

of fraudulent sales in this country (Record, pp. 210–211).

There is not one word of consent in the case, nor any act of Andreas Saxlehner or the complainant inconsistent with their claim of exclusive title.

The Apollinaris Company had no authority to abandon any rights of Saxlehner.

The decision of the Circuit Court denying an injunction upon the name Hunyadi was based upon a supposed abandonment of the name Hunyadi by the Apollinaris Company. The Circuit Court found that the Apollinaris Company was never an agent of the owner of the well and that Saxlehner's relations to it were those of seller and buyer, but it continued:

> "*Inasmuch as it was the sole person who had* "*the right to sell the Janos water in this coun-* "*try and to use its trade-mark and to enjoy* "*the good-will of the business, it was in a* "*position in which it could in fact destroy the* "*name and the good-will, if its own interest* "*dictated such a course.*" "*As the name had* "*become in fact a trade name in* 1886, *so,* "*also, it could by affirmation and positive ac-* "*tion cease to be such, and when it had pub-* "*licly become open to use by competitors, the* "*persons who invested their money, in the* "*honest belief that the name was public prop-* "*erty, should have a fair standing in a court* "*of equity. I am obliged to say that by the posi-* "*tive action of the corporation, which alone* "*had the right to the enjoyment of the name* "*in this country, and which had the right to* "*bring suits for its protection, it became,* "*after* 1888, *one which dealers in Hungarian* "*bitter waters could use as a prefix to the* "*other specific name of the respective waters.* "*They could not call their water 'Hunyadi,'* "*but they could use the word as a prefix*" (Record, pp. 626–627).

This reasoning was disapproved by the Circuit Court of Appeals, which held that "Inasmuch as the company was not Saxlehner's agent he cannot fairly be held to be bound by any 'positive action' of their's of which he was not advised" (Record, p. 659). Nor can it be sustained upon the facts. As we have already seen, the company could not prevent other people from selling Saxlehner's Hunyadi Janos Water in this country who had procured it by purchase abroad. Its exclusive claim to the use of the trade-mark could therefore not be substantiated. Nor can it be said that "it solely enjoyed the good-will of the business," because whatever increase of the business there was inured to the profit of Saxlehner also, who likewise suffered from a decrease. There was between them nothing but the relation which very commonly exists among manufacturers and merchants by which a manufacturer agrees to sell his whole product for a time and for a certain territory only through a certain merchant. To the public this makes no difference, as long as the producer's name appears upon the article. Saxlehner's water did not appear on the market as the water of the Apollinaris Company but as Saxlehner's water, sold here by the Apollinaris Company. Whatever was added by the company to the label might be its property, but at no time and in no manner did the company ever acquire any rights of Saxlehner in or to the name or the label. This is not altered by the fact that Saxlehner upon the bottles shipped to the company printed a notice over his signature that "*Imitations of this water or of the label or of the capsule will be the subject of legal proceedings at the instance of the Apollinaris Co., Limited, 19 Regent Street, London.*" This was nothing but a notice to the public that the company would proceed against infringers, but did not give the company any right to sue in Saxlehner's name, or for him, or in his behalf. The company had valuable interests in

the matter, which it undoubtedly would try to protect, and of this intention Saxlehner gave notice on the label. This was, however, no authority to bring suit for him, still less an authority to abandon or compromise his rights or claims. It is hardly necessary to call attention to the fact that, even if some authority could be spelled out of such a notice, a definite and unequivocal authority to abandon or forfeit any rights for another would be required for the purpose of accomplishing any such effect. The company at best was a tenant only and could not grant or abandon any rights of the owner which it did not itself possess. Nothing that it did could exceed the limits of its contract which was the basis of all authority, both as to the time and the essence of its rights. That Saxlehner knew anything of the publications of the company is not claimed in the suit, nor is there any evidence substantiating such knowledge. That he knew of the litigations commenced by the company about 1887 and voluntarily discontinued by the company in 1888 is claimed by the defendant, but not proved by competent evidence.

The Circuit Court, which reluctantly came to the conclusion that the name "Hunyadi" had been lost by abandonment by the "positive assertions" of the Apollinaris Company, evidently was influenced by the circular of 1893, which is shown by the fact that it found such abandonment of the name, but not of the label. If that position was well taken, it would have followed that the abandonment took place in 1893, and not in 1888, as stated in the opinion of the Circuit Court. In the absence of any consent by complainant, however, as we respectfully submit, no rule of law exists which would make these assertions of the company binding upon complainant. That they did not furnish an inducement to defendant to commit the fraud is sufficiently shown by the date of the publication.

The defendant had no reason to presume that Saxlehner intended to abandon anything.

Saxlehner's prior rights and his efforts to prosecute infringers in Hungary were well known to Eisner when the Eisner & Mendelson Co. contrived its scheme to imitate the name and label in 1890. Saxlehner's trade-mark "Hunyadi" was then registered in the United States Patent Office, and the registration contained a reference to the blue and red label used by Saxlehner which had been known to Eisner for many years in this country. Any knowledge of the suits instituted by the Apollinaris Company against Andres and Ungar, from 1886 to 1888, could not convey to Eisner or anybody else information that Saxlehner had brought or authorized those suits, and it plainly appeared therefrom that the Apollinaris Company held only a contract for a term of years. That contract was not recorded, nor were its terms known to Eisner and he had therefore to assume that it might be ended at any time. The defendant company made no attempt to inquire of Saxlehner whether he objected to the use of the proposed name and label, but endeavors to justify its conduct by testimony concerning a conversation between Mendelson, the treasurer of the defendant company, and Steinkopf, the director of the Apollinaris Company in London. The proposed label was not mentioned at that conversation, which turned only about the fact that defendant intended to sell the Hunyadi Matyas Water of which it had obtained control by a lease. Steinkopf stated "that he could have no objection to that, that there were other Hunyadi waters" (Record, p. 455). This conversation can be harmonized with a belief of Steinkopf that his company had no legal remedy in view of the state of the Hungarian laws. It had no reference to the label and would not, even for the Apollinaris Company, be evidence of a voluntary abandonment of any claim to the label.

The other conversation to which defendants refer took place with Haldenstein, an agent of the Apollinaris Company in New York, *after defendants had commenced to use the red and blue Hunyadi Matyas label there*, and it also is of no force as binding Saxlehner. It cannot be claimed to have acted as an inducement to defendants to adopt the name and label, because it took place in 1892, which was two years after they had been adopted (Record, p. 353).

The inquiries which Eisner made in Hungary could only convince him that Saxlehner had tried to enforce his rights, without being able to obtain a relief there, but could not satisfy him that Saxlehner had abandoned anything. Indeed, while he was in Budapest in 1889, he contrived the label for "Mattoni's Royal Hungarian Bitterwater," which employed neither the name "Hunyadi" nor the red and blue color.

It was upon his return to the United States, and when he saw the commercial success of the red and blue Hunyadi Arpad label here, that he made up his mind to try the same kind of a fraud. It was then, in 1890, that he "investigated the matter" and found that the Apollinaris Company (not Saxlehner!) had withdrawn its suit against this label, and with this information he thought he was safe, and substituted for the honest Mattoni label the dishonest red and blue Hunyadi Matyas label. During all this time he never inquired of Saxlehner, whose trade-mark "Hunyadi" was publicly registered in the Patent Office, and whose red and blue label had been known to him for many years, what he would do about it. He knew that the company had only temporary rights, because the company's bill of complaint stated this (R., p. 569). He knew further that the defense relied on by the defendants in the Andres and Ungar litigations was not based upon prior use, but upon the contention that by the law of Hungary their doings were not illegal. With reference to the label, this was not even claimed and concerning its palpable imita-

tion he had nothing to influence him, beside the fact that the Apollinaris Co. had discontinued its proceedings against it. (R p. 387, also p. 418). Mendelson did not mention it in his conversation with Steinkopf in London.

We submit that if this contention did not furnish defendant a complete *legal* defense, it certainly did not entitle him *in equity* to commit a glaring fraud upon complainant.

The proofs further show that, soon after it had embarked upon this business, defendant learned of complainant's litigation in Hungary which was designed to enjoin all the imitating names and labels, including the "Hunyadi Matyas" "Hunyadi Arpad" and "Hunyadi Laszlo" used in that country.

The defendant company had a regular business representative in Berlin, who, according to Eisner's testimony, frequently visited Budapest (Record, pp. 333 and 409 and 410). Eisner denied that he had any knowledge of that suit until about 1895 or 1896, but his own testimony proves that this was not true. He admitted on cross-examination that *Mattoni told him "that Mr. Saxlehner was trying the same thing he tried once before in reference to the Hunyadi trade-marks, and that he did not take any stock in it at all; he treated it very lightly"* (Record, p. 412). Now, it is evident from that conversation that it must have happened previous to March 31, 1894, because at that time Saxlehner had already obtained his first decree against Mattoni & Wille cancelling their white and red Hunyadi Matyas label (R., p. 257). When was it? Eisner testifies that he did not visit Budapest in 1894 and in 1895, but did visit Budapest in 1892 or 1893. It is evident that it must have been at a visit in one of those last mentioned years (Record, p. 400).

Among the letters which the witness reluctantly produced there was also found a letter from Mattoni & Wille, dated September 14, 1893, containing a reference to another previous letter, in which they informed the defendant company that there was

some proceeding before the Minister of Commerce with reference to their trade-marks. That first letter, however, was not produced (R., p. 400). Nor did the witness produce any business correspondence of importance with Mattoni & Wille.

Further, it appears that about November, 1892, the Eisner & Mendelson Company wanted to have also a weaker water, and were informed by Mattoni that he would first have to apply for permission to sell the water of a new well (R., p. 395). Mattoni made the application, stating that the name of the water was to be "Hunyadi Matyas III." He was informed by the Minister of Commerce that no permission was necessary, but was "*warned not to use any trade-mark, name, firm or designation of business that would mislead the public,*" calling his attention to the law of 1890 (R., p. 275). Despite of this warning, and in spite of the litigation against the Hunyadi Matyas label instituted by complainant in 1891, Mattoni and defendant devised another red and blue label for this Hunyadi Matyas No 3 in further imitation of complainant's colors and style of label and used it, until for business reasons that use was given up (R., pp. 395, 397). The correspondence relating to all this has not been produced, although it was repeatedly called for, but it is sufficient that Eisner admits that Mattoni informed him of complainant's suit. Just as he had adjudged for himself, in the first instance, that Saxlehner could not stop him, so he continued to take his chances, making in the meantime as much profit out of the business as he could.

Knowing that such a suit had been commenced, it is impossible to believe that he did not know of its result in 1894. The question *must have been discussed* whether after that decree of March, 1894, the defendant would continue the use of the imitating label, because both the red and white and the red and blue labels of Saxlehner were registered for complainant, and the same principle applied to both. It is probable that defendant was further ad-

vised of Mattoni's attempt to register new labels in 1894 and 1895, and admitted that it knew of the second suit of complainant against Mattoni in 1895 and its final outcome in 1896.

Likewise defendant *must have been informed* in 1894 by the company selling the Hunyadi Laszlo Water to it, of the decree rendered in that year cancelling that label. For this water defendant had no label of its own device, and it ceased to sell the water shortly after that decree (R., p. 277).

At no time, therefore, had the defendant company any right or reason to believe that complainant abandoned her trade-mark rights.

Defendant did not build up a business in good faith nor of any valuable character.

The witness Eisner approximately stated from memory that defendant had spent about $25,000 for advertising "Hunyadi Matyas" water. This amount was grossly over-estimated. Two experts in the advertising business carefully examined every scrap of evidence concerning such advertising and computed its expense. They both agreed that the total cost of defendant's advertising, as testified to by Eisner, could not have exceeded the sum of $2,500 (Record, pp. 153-157; also pp. 169-170). Both witnesses also testified that all the advertisements referred to by Eisner were merely inserted in TRADE papers and not in papers which go to the public. Mr. Elliot stated:

> "*They are not papers that any man would use to create a demand with the public for these goods; they don't belong to the class of publications that any manufacturer would use in order to create a demand among customers —not one of them.*"

Every druggist whom the defendant could reach was put in possession of *a copy of a label* under

which defendant offered this water and of the various false statements by which this water was sought to be connected with the well known "Hunyadi" water of Saxlehner and identified with the same as far as possible. Eisner quite truly characterizes this manner of advertising the "Hunyadi Matyas" water as a bold undertaking (Record, p. 331).

So far from being a justification for defendant, this method of advertising is clearly only an aggravation of the tort committed, because the intent is evident to furnish the trade with a convenient instrument of fraud under the cover of legal sanction of the same in Hungary.

That the large sales of the "Hunyadi Matyas" water were due entirely to the fraudulent label and name, and not to any demand among the public for the water either by reason of its excellency or by defendant's effort to advertise the water among the public, is shown by the fact that the "Hunyadi Lajos" water sold by Nielsen, WHICH WAS NOT ADVERTISED AT ALL, was sold in the same large quantities; that the defendant later on stipulated to sell as much "Hunyadi Arpad" as "Hunyadi Matyas" water (Record, p. 331), and also by the testimony of defendant's witness Paul Scherer.

Scherer testified that water with the name "Æsculap" thereon and a red and white label had been imported from Hungary to a firm in New York on whose hands it remained practically unsalable for four or five years. The water became old and stale, when Scherer finally purchased a large part of the lot, and, on his own responsibility, had a *new label prepared for the same in red and blue colors upon which he printed the name, "Hunyadi Aesculap."* As soon as he put this label upon the water he was able to dispose of the whole lot without the slightest difficulty (Record, pp. 447–9; also 273–4). Specimens of these bottles were offered in evidence as "Complainant's Exhibit Aesculap Bottle," and "Complainant's Exhibit Hunyadi Aesculap Bottle."

We have already shown that this water advertised and sold by defendant as "Hunyadi Matyas" water in the United States did not come from the "Hunyadi Matyas" spring, but from the "Franz Deak" spring, and that defendant either knew this or had good reason to know it, because a spring called "Hunyadi Matyas No. 2" did not exist before it made its second contract with Mattoni & Wille. In addition to this it should be borne in mind that defendant never was the owner of any spring called "Hunyadi Matyas," and that its own rights were only those of a lessee and of a temporary character. It could therefore not build up any trade of permanent value, because Mattoni & Wille might not be willing to prolong the lease.

The name "Hunyadi" has not become a generic name.

The Circuit Court did not and could not from the evidence find that the name "Hunyadi" or "Hunyadi Water" had changed its original meaning into a generic name for Hungarian bitter waters generally. It found among the facts clearly proved that complainant's water "is commonly designated by consumers in the United States as 'Hunyadi Water,'" and drew the inference from this that the other spring owners "could not call their water 'Hunyadi.'"

The Circuit Court of Appeals did not disturb this finding, but based its opinion entirely and solely upon an imputation of laches to complainant which was supposed to make it inequitable to grant her the relief prayed for.

Fifteen physicians, most of whom had practised in New York City for many years and had lived on the very spot where defendant claims to have been openly and publicly selling its water in competition with that of complainant, have testified that "Hunyadi Water" has only one meaning to them,

and that is "Hunyadi Janos"; that they prescribed it for years as such either by written prescription or by oral directions, and in every instance expected that "Hunyadi Janos" would be furnished in answer to such prescription. We refer the Court to the testimony of Dr. Robert McLean Taft (Record, p. 124); Dr. Robert M. Daley (Record, p. 126); Dr. James A. Gardiner (Record, p. 127); Dr. Frank G. Esson (Record, p. 128); Dr. Charles A. Kinch (Record, p. 130); Dr. William A. Ewing (Record, p. 133); Dr. Richard E. Brown (Record, p. 135); Dr. James H. Dew (Record, p. 137); Dr. Henry F. Owsley (Record, p. 142); Dr. Frank Hollister (Record, p. 144); Dr. George B. Fowler (Record, p. 149); Dr. Augustus Caille (Record, p. 151); Dr. Arthur M. Jacobus (Record, p. 171); Dr. Hobart Cheesman (Record, p. 185), and Dr. Henry F. Robinson (Record, p. 187).

Their testimony, as it is here presented, is fairly representative of the knowledge and opinion of the medical profession which prescribes the water. The medical profession either has had no knowledge at all of the fraudulent substitution which has been going on to a considerable degree, or wherever single instances of such substitution have come to its knowledge, has frowned upon it. *Not a single physician has been called by the defendants to testify to any other opinion or belief among the medical practitioners or among the consuming public.*

This same fact is corroborated by a number of other witnesses, grocers, druggists and consumers, among whom are representatives of the well-known firms of Acker, Merrall & Condit, and Park & Tilford. Their testimony is well summed up in the statement of the witness Henry A. Cassebeer, a well-known druggist in New York City, who testifies that it is his belief that when people ask for "Hunyadi" water they invariably want "Hunyadi Janos" (Record, p. 174).

In this connection we will shortly refer the Court to the evidence of the witnesses William B. Higbie

(Rec., p. 81); John R. Agnew (Rec., p. 83); Henry A. Cassebeer (Rec., p. 174); Abram B. Kerley (Rec. p. 183); Oscar Krause (Rec., p. 177); John E. Philips (Rec., p. 226); George B. W. Brown (Rec., p. 230); Maurice Leon (Rec., p. 219).

As an answer to this the defendant has called a few dealers in mineral waters and druggists, who testified in substance that since about 1889 there were several Hunyadis known *in the trade*, distinguished by the various additions to this name. None of these witnesses undertake to testify as to what is known *by the public* under the name "Hunyadi," but they all confine their testimony entirely to the meaning of the word among the trade, namely, the wholesale dealers and those retailers who buy of the wholesalers. Now, it is very plausible that if the wholesaler has several bitter waters bearing the name "Hunyadi," he will inquire which particular Hunyadi is called for and distinguish the different waters by the additional name. But the same would be true of any dealer who even for the period of a few weeks or for one day would be furnished with several such waters. The most respectable of defendant's witnesses, Charles O. Weisz, employed by a large firm, admits that whenever any person asks him for a bottle of genuine Hunyadi, he gives him Janos (R., p. 490.)

The claim made by the retail druggists called as witnesses by defendant is in substance that whenever "Hunyadi" was called for at their store they would inquire which "Hunyadi" was meant, and furnish that which the purchaser demanded, and if the purchaser did not insist upon any particular water, would give him that on which they made the most profit.

This again, even if true, does not establish the proposition that the public used the term "Hunyadi" as a generic term. But the Circuit Court did not believe those professions of honesty, in the light of the overwhelming evidence of fraud in the case.

That the name "Hunyadi" and the red and blue label have not become the common attributes of Hungarian bitter waters during the time while these imitations have been on sale, is sufficiently shown by the fact that during all this time other Hungarian bitter waters, such as the "Franz Josef" Water, the "Victoria" Water, the "Rakoczy Gyorgy" Water, and others, have been sold in this market under their own names and under their own labels not in imitation of Saxlehner's, and have never been called Hunyadi waters (Record, pp. 475, 491). All witnesses for defendant agree that they called "Hunyadi" only those waters which bore that name on the label.

Nor is the claim, assiduously brought forward by the defendant, that the name and label had become descriptive of a certain group of bitter water springs near Budapest, founded upon fact, because some of these imitations, such as the "Hunyadi Lajos" and the "Hunyadi Vilmos," came from springs situated at remote parts of Hungary, and far away from Budapest.

It is natural to presume that a druggist, being called as a witness, will not admit that he has sold an imitation for the genuine article, but the evidence in the case leaves no doubt upon the fact that many of the retail druggists whom defendant has called made such improper use of the name and label. A characteristic instance is the witness Sherman F. Hennessey (Record, p. 469). He was one of those who pretended to always inquire which "Hunyadi" the customer wanted, but the falsity of this was shown by four witnesses, Leon, Kearney, Herling and Machado, whose testimony showed conclusively that at his very store "Hunyadi Matyas" Water was regularly sold without question, when "Hunyadi" was demanded, and even when "Hunyadi Janos" was demanded (Record, pp. 191, 193, 196 and 219).

This simply confirmed the testimony of numerous witnesses called by the complainant as to the fre-

quency of such fraudulent practices. See the testimonyof Tito Toscani (Record, p. 109); William Stempel (Rec., p. 84); Bernhard Osterman (Rec., p. 92); Samuel Ginsberg (Rec., p. 97): Samuel Shulman (Rec.,p. 101); P. L. Focardi (Rec., p. 224); Eugene Eble (Rec., p. 233).

Toscani, who visited about two hundred drug stores on behalf of complainant, found that while in the better class of stores he would invariably get "Hunyadi Janos" water when asking for "Hunyadi," the practice was frequently different in those sections of the towns where the poorer population lived. In such stores he received "Hunyadi Matyas" or "Hunyadi Lajos" water in many instances even when he distinctly called for a bottle of "Hunyadi Janos." The experience of Stempel was very similar.

The defendants Adolph Gies and Louis Marquet, retail druggists, hotly contested the charges made against them, but the Circuit Court became convinced that the evidence against them was true. They and other druggists fell easy victims to the temptation offered by the fraudulent labels of the defendant company. All these waters were not sold as "Matyas" water or as "Lajos" water, but as "Hunyadi" water, and they were sold upon the reputation of the well known "Hunyadi Janos" with an inducement of a lower price.

The infringing waters were undoubtedly sold in large quantities, but there is no convincing evidence that the figures stated in Haldenstein's table were even approximately correct. The manner of his inquiries precluded all kind of verification. Even if honestly made, there is no saying how many such statements in newspapers, &c., were mere duplications. The information was prepared by a hostile witness, was mere hearsay evidence and properly objected to as incompetent (R., p. 539).

Complainant was not guilty of laches.

We will not reiterate the facts found by the Circuit Court on this point, but simply call attention to the fact that previous to 1895 Saxlehner's right to the name "Hunyadi" in this country as an exclusive trade-mark for bitter waters was embarrassed and brought in question by the fact that the owners of other springs in Hungary could not be restrained there from calling their springs by names employing "Hunyadi" as a part, and that this was used as a pretext by imitators in this country to impair Saxlehner's chances of success here. It would in our opinion have been a sufficient excuse for inaction on his part if in this situation he had decided to resort first to the Courts of Hungary to establish his right, as there was plausibility in the contention that, if the waters of a certain spring could be called "Hunyadi Matyas" in Hungary, they could be called "Hunyadi Matyas" in this country. This defense received color of authority partly by the unsatisfactory condition of the Hungarian law and pretended concessions by royal grant to Mattoni & Wille, and also particularly by the treaty between Austro-Hungary and the United States of America of June 1, 1872. By this treaty it was provided that if a trade-mark was abandoned in the home country, it should be considered abandoned in the country of the other contracting party, and the inference was claimed to follow that if there was no trade mark in the home country recognized in the word or label used, no such trade-mark should be recognized in the other country.

The Circuit Court held:

> "In 1886, when substantial competition in the sale of Hunyadi Bitter Waters made its appearance in this country, the name 'Hunyadi' was in fact the established trade mark of the Janos Water. It was prevented from taking that position in Hungary or in continental Europe by the decision of 1873 which

> declared that 'Hunyadi Janos' and 'Hunyadi Matyas' were different names. Whether upon an attack Saxlehner could have then maintained his right to have an exclusive use of the name in this country is not now clear."

The Circuit Court of Appeals in its opinion did not express any dissension from this position, but inasmuch as it charged Saxlehner and complainant with laches commencing with the year 1888, it must have been of opinion that Saxlehner's rights in this country were entirely unhampered, clear and not embarrassed by any doubtful question. While, in substance, we concede and even assert that Saxlehner should have found protection in this country at any time against the imitators of his name and label, it is undeniable that, previous to the time when complainant's rights were fully established and recognized in Hungary, there was considerable embarrassment in the solution of the question, and even jurists of wide experience might have been of a contrary opinion. The opinion of the Circuit Court renders strong evidence of this.

We have been unable to find any reported decision, previous to the year 1890, authoritatively settling the contention in Saxlehner's favor. In the Andres and Ungar litigations, eminent counsel (Bangs, Stetson, Tracy and McVeagh and ex-Governor Edward Salomon), contended that the Hungarian law, being the law of the origin of the water, name and label, settled the point in favor of the defendants. The Apollinaris Company seems to have been greatly impressed with the plausibility of this view, especially as Saxlehner just then failed again to get any recognition of his rights in Hungary in his suit against the Hunyadi Joseph water in 1887.

The decisions in the case of *Kaiserbrauerei Beck & Co.* vs. *Baltz Brewing Co.*, 71 *F. R.*, 695; *and* 74 *F. R.*, 223, have since then settled the law in favor of complainant, and at the present time jurists

would probably agree that Saxlehner was entitled to protection against the Hunyadi Arpad and Hunyadi Matyas labels in 1887 irrespective of any recognition at home. But this was by no means clearly or fully understood at the time. Whatever suggestion there is in the case that Saxlehner knew of these litigations here is contained in Prince's affidavit, who states that the Apollinaris Company informed him that it or its counsel thought his chances of success very doubtful. Under those circumstances can Saxlehner be blamed if he decided to wait, registering in the mean time (1887) his name "Hunyadi" in the Patent Office so as to apprise the public of his exclusive claims to the name?

He had also reason to suppose that the Hungarian authorities, legislature and ministers, would gradually come to recognize the urgent need of further protection of Hungarian trade-marks, on account of the fact that at that time the protection given to the trade-marks of foreigners in Hungary was actually greater and more sweeping than that accorded to the trade-marks of its own citizens (see Complt.'s Exh. Hungarian Certificate as to Word Registrations, R., p. 307).

As soon as these rights were extended to the citizens of his own country, Saxlehner could have registered the name "Hunyadi" in Hungary and then have claimed in America the absolute protection of the treaty of 1872 above referred to. Was he under such circumstances compelled to risk defeat and the entire loss of his name "Hunyadi," in order to retain his right to his trade-mark which was registered as his property in the U. S. Patent Office?

Neither can Saxlehner be charged with laches in not proceeding against the red and blue "Hunyadi Arpad" label which had come into this country in 1886, and was stopped by injunction at the suit of the Apollinaris Company until 1888. If Saxlehner

had brought suit or authorized a suit with a view to obtain an injunction against the *label* merely, he would undoubtedly have been held to have thereby abandoned any exclusive claim to the name "Hunyadi." The name and label were always associated together, and the danger which attended one of them was a sufficient reason not to commence a suit upon the other alone.

Soon after Saxlehner's death, in 1889, complainant obtained relief upon the label by a trade-mark statute passed in Hungary in 1890. As we have shown on page 32 of our brief, she at once took advantage of this statute, registered her labels once more in accordance with its provisions, and early in 1891 gave notice to Mattoni & Wille and the other infringers of her intention to prosecute them. She instituted suit against them all in the year 1891 and carried on a number of litigations through the years 1891, 1892, 1893 and 1894, in the course of which latter year she came out victoriously against every infringer. Right after this, in 1895, she for the first time, by the statute of that year, acquired the right to register the mere name "Hunyadi" as her trade-mark and did so; her enemies did the same, but she instituted suits against them all once more and was finally successful against them all in October, 1896. *These litigations were directed against the very persons who furnished the imitating waters to the defendants*, and the evidence shows that the principal importers had early knowledge of these suits in Hungary. About the same time she also proceeded against Mattoni & Wille in Germany before the Patent Office, and against the Apollinaris Company before the English Court of Chancery in London, and everywhere obtained judicial and final recognition of her trade-mark rights.

Hence, that which is prohibited to defendants in Hungary and elsewhere, is legalized in the United States by the decision below as to labels which can

be applied to the infringing waters in the United States only, and when the Circuit Court of Appeals says in effect that she slept on her rights for nine years, it ignores the difficulty of her position before 1890 and the five years of vigorous contest after 1890.

To charge complainant with laches in not instituting suit in this country at an earlier time, would invoke a new rule of law which has hitherto not been applied by the courts. No one has ever been required by courts of equity to litigate rights which were so embarrassed by the conflicting state of law in the two countries, or where the litigant's position was such that he was not fully advised upon the situation, or there were other sufficient reasons to excuse his inactivity.

In the present case, instead of inactivity complainant has displayed an unusual amount of energy in asserting her rights, and the same is true of her predecessor, Andreas Saxlehner. If they were not successful in Hungary earlier, it was not their fault, but the fault of the Hungarian laws. Moreover, as to these defendants, who claim under Mattoni & Wille, it is clear that there were no laches whatever, for while they only began to infringe here in 1890, she was as early as the summer of 1891, pursuing their principals by suits in Hungary, and tested her exclusive claim to the name and label in litigations which only ended finally in October, 1896.

Under these circumstances a further protest communicated to the defendant company would have been unnecessary and merely formal. The defendant would not have stopped its sales here as long as it was furnished with the water and the infringing labels by Mattoni & Wille, nor had the complainant any reason to expect that such would be the case. Defendant openly defied her here, because Mattoni & Wille openly defied her in Hungary. This is the only ground upon which defendant justified its adop-

tion of the label in 1890. Neither the defendant nor any other infringer in the United States had a right to expect that she would not prosecute them, because she was prosecuting all their principals in Hungary from 1891 until 1896. All those who sold the waters in the United States during that time took their chances and should at least have immediately discontinued the use of the infringing labels as soon as the contest between the principals was finally decided in complainant's favor in Hungary.

We also submit that complainant had a right to seek the support of her claims given to Austro-Hungarian subjects in the United States under the treaty with this country. All necessary steps were taken by Saxlehner in this direction by registering his trade-mark "Hunyadi" in connection with his red and blue label in the Patent Office of the United States in the year 1887, and registering the same label (because the name alone could not then be registered) in the Chamber of Commerce and Industry of Budapest. Such registration was made by him on December 30, 1884, and the red and blue label was reregistered in Budapest on July 14, 1890. Such protection, however, could not accrue to complainant on the name "Hunyadi" until August, 1895, when the Hungarian statute for the first time allowed complainant to register that name independent of any pictorial design as a trade-mark in Hungary, which was then done.

The Circuit Court of Appeals rested its decision solely upon the supposed authority of the case of *Menendez* v. *Holt*, 128 *U. S.*, 514. We do not understand that this decision has changed the law upon the subject as laid down by previous decisions of the Supreme Court and notably in the case of *McLean* v. *Fleming*, 96 *U. S.*, 245. The total loss or forfeiture of trade-mark rights once obtained can, in our opinion, under these cases, not be produced by laches or negligence of the owner, even where they exist, unless the owner allows the word or sign

to fall into public domain, that is, if he allows it to become part of the language of the country, as a descriptive term, which never happened in this case.

In the case of Menendez *v.* Holt, this Court used the following language:

> "*The intentional use of another's trademark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired by that negligence the right to cut down the remainder* (*Attorney-General* v. *Eastlake*, 11 *Hare*, 205); *nor will the issue of an injunction against the infringemnt of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right* (*Fullwood* v. *Fullwood*, 9 *Ch. Div.*, 176). *Acquiescence to avail must be such as to create a new right in the defendant* (*Rogers* v. *Nowill*, 3 *DeG., M. & G.*, 614). *Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license'* (*Duer, J. Amoskeag Mfg. Co.* v. *Spear*, 2 *Sandford* (*N. Y.*), 599; *Julian* v. *Hoosier Drill Co.*, 78 *Indiana*, 408; *Taylor* v. *Carpenter*, 3 *Story*, 458; s. c., 2 *Woodb. & Min.*, 1).

> "*So far as the act complained of is completed, acquiescence may defeat the remedy on*

the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of estoppel could rarely arise."

Again, in the case of *McLean* vs. *Fleming*, 96 U. S., 245, 257, this Court, through Clifford, J., stated:

"*It sufficiently appears that the respondent has been engaged in preparing and selling his pills for more than forty years; that during that period, or more than half of it, he has been using labels and trade marks corresponding more or less to those used by the predecessors of the complainant, some of whom, during all or most of that time, knew what the labels and trade-marks were which were used by the defendant, the evidence to that effect being full and decisive.*

"*Negotiations took place at one time between the respondent and one of the predecessors of the complainant for an interchange of commodities, with a view that both commodities might be sold at each of their respective places of business.*

"*Evidence of a decisive character is exhibited in the record to show that the complainant or his predecessor knew throughout what descriptions of labels and trade-marks the respondent was using, and it does not appear that any objection was ever made, except as heretofore stated and explained. Once the respondent was requested to insert the initials of his Christian name before his sur-name in the label, and it appears that he immediately complied with the request.*
* * *

"*Acquiescence of long standing is proved in this case, and inexcusable laches in seeking redress, which show beyond all doubt that the complainant was not entitled to an account nor to a decree for gains or profits; but infringement having been proven showing that*

the injunction was properly ordered, he is entitled to the costs in the Circuit Court, but the decree for an account and for the supposed gains and profits being erroneous, the respondent, as appellant, is entitled to costs in this Court."

In the recent case decided by this Court of the *Singer Manfg. Co.* vs. *The June Manufg, Co.*, 163 *U. S.*, 169, 186, the Supreme Court stated with approval a passage from De Marafy in his International Dictionary of Industrial Property, as follows:

> *" Abandonment in industrial property is an act by which the public domain originally enters or re enters into the possession of the thing (commercial name, mark or sign), by the will of the legitimate owner. The essential condition to constitute abandonment is, that the one having a right should consent to the disposition. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."*

In several other recent cases this Court has discussed the principles applying to the defense of laches, notably in the case of *Galliher* v. *Cadwell*, 145 *U. S.*, 368. In this case the Court summed up the character of the defense of laches in the following language:

> *" The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or rela-*

tions during this period of delay, it would be an injustice to the latter to permit him to now assert them."

See also *Lawrence Manufacturing Co.* v. *Tennessee Manfg. Co.*, 138 *U. S.*, 537, *p.* 548; *Manhattan Medicine Co.* vs. *Wood*, 4 *Clifford, U. S.*, 461; *Blackwell's Durham Tobacco Co.* v. *McElwee*, 100 *N. C.*, 150; *Lasher* v. *McCreery*, 66 *F. R.*, 834, 840; *Imperial Chemical Co.* v. *Stein*, 69 *F. R.*, 616; *Gillott* vs. *Esterbrook*, 47 *Barb.*, 455; *Cahn* vs. *Gottschalk*, 14 *Daly*, 552.

This Court has exhaustively reviewed the authorities relating to the defense of laches in cases where the defendant was guilty of actual fraud, in the recent decision of *McIntire* vs. *Pryor*, 173 *U. S.*, 38, stating as its conclusion that "*where the fraud is clearly proven, the Court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay.*"

In view of these authorities we say that the defense of LACHES, upon which the Circuit Court of Appeals dismissed the bill in this case, is not sustained by the proofs, and its decision is in conflict with well settled principles. Indeed, the same Court has recently rendered a decision in another case in which its *dictum* is entirely at variance with the principles of its "Hunyadi" decision and in line with the authorities, in a case which involved much stronger merits for the defendant. In its decision in *Republic of France* vs. *Schultz* (not yet reported and submitted in certified copy), the defendant had for 30 years before the commencement of the suit used the name "Vichy" on his bottles of artificial Vichy water, in perfectly good faith and without any attempt to deceive. Soon after suit was brought, he added the word "Artificial." His death prevented the issue of an injunction, but the Court stated in its opinion that in spite of such long use, and in spite of the uni-

versal practice shown by the proofs, the use of the name "Vichy," as the matter stood at the commencement of the suit, *could have been prevented by injunction.*

We are not aware of any rule of law or equity which requires a complainant to sue all infringers upon his rights at the same time; on the contrary, the reasonableness of allowing him to await the outcome of test suits has been frequently recognized by our courts (*Edison Electric Light Co.* v. *Sawyer-Mann Electric Co.*, 53 *F. R.*, 597; *Accumulator Co.* v. *Edison Electric Illuminating Co.*, 63 *F. R.*, 981; *Estes* v. *Leslie*, 27 *F. R.*, 22).

All element of estoppel is eliminated from the case entirely by the fact that defendant did not act in good faith in introducing its water under the fraudulent label and name. No one who is not himself honest in his claims can assert an equitable doctrine in court. This applies to a defendant as well as to a plaintiff (*Brown* vs. *Lake Superior Iron Co.*, 134 U. S., 530). The defendant did not build up a legitimate business in good faith relying upon assertions which the complainant had made or authorized to be made, but took advantage of defects of the law which seemed to shield fraudulent imitators and succeeded in making heavy inroads upon complainant's business by fraudulent devices. There is no evidence in the case whatever that the name "Matyas" or the little red seal label used by the defendant had given an enhanced reputation and market to the "Hunyadi" water; on the contrary, the evidence very clearly shows that the "Hunyadi Matyas" water is sold and always was sold because it bore the name "Hunyadi" and the simulated label.

In the case of *Gilka* v. *Milhalovitch*, the defendant's plea was that for twenty years past they had sold in the open market the devices described in the bill, which fact must have necessarily been known to the plaintiff. *Sage*, District Judge, in delivering the opinion of the Court, said as follows:

> "*But here the only circumstances relied upon to charge the plaintiffs with constructive notice is that they were represented by agents located at the City of New York, nearly eight hundred miles distant from the defendant's place of business. The defendants have been confessedly conducting all these years a spurious business, manufacturing and selling imitation goods, and using labels that they must have known were calculated to deceive and defraud. They are hardly in position to come into court and assert equities growing out of that business against the manufacturers of the genuine article, whose trade mark they have been infringing. It is not a case of innocent use with complainant's knowledge, nor is it a case where it is shown that the complainant had sufficient knowledge to lead him to the fact, and therefore should be deemed conversant.*"
>
> *Gilka* v. *Milhalovitch*, 50 *F. R.*, 427.

Again, in the case of *Sanders* v. *Jacob*, the same point, that a defendant who is not himself honest, cannot plead an estoppel in such a case, was ruled upon by *Judge Thomson* as follows:

> "The question of laches would be a serious one if there were no element of fraud in the case on the part of the defendant. * * * If the defendant had adopted his trade name innocently and had gone on honestly practicing his trade under that name for four years without objection on the part of the plaintiff, and had built up an extensive business under that name, we should say that it would be contrary to the maxims of equity to enjoin him from further practicing under that name at the suit of the plaintiff at this late date. But where the element of fraud supervenes, lapse of time does not purge the defendant's conduct of this taint."
>
> *Sanders* v. *Jacob*, 2 *Western Reporter*, 408.

If the consent of the Apollinaris Company to the dissolution of its injunctions is regarded as an admission that it had no right to enforce (which is the strongest that can be said), this is no ground upon which to base an estoppel. In order to create an estoppel there must be a material representation of a fact. Statements of law are as inoperative by way of estoppel as would statements of an opinion.

Ross vs. *Banta*, 140 *Indiana*, 151.
Akin vs. *Kellogg*, 119 *N. Y.*, 442.
McKeen vs. *Naughton*, 88 *Cal.*, 467.
Brewster vs. *Striker*, 2 *N. Y.*, 19.

"If both parties are equally cognizant of the facts, and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby, and is entitled to the application of the rule, but will be considered as having acted upon his own judgment only."

Holcomb vs. *Boynton*, 151 *Ill.*, 294.

The same was held in *Estis* vs. *Jackson*, 111 *N. C.*, 145; *Cameron* vs. *Cameron*, 95 *Ala.*, 344; *Whitwell* vs *Winslow*, 134 *Mass.*, 343.

Aside from this the very admission of the Apollinaris Company that the law was against it, was induced by the very persons or their principals who now seek to obtain a benefit from it in the nature of an equitable estoppel. This again militates against the principle that where the representation relied on to create an estoppel has been induced by a previous representation by the other party or his agent, no estoppel can arise, and in itself is conclusive against defendant's claim.

Holden vs. *Putnam F. Ins. Co.*, 46 *N. Y.*, 1.

Summary.

We therefore submit that the case establishes fully, and by substantially uncontradicted evidence, the following contentions:

1st. That the complainant had and has an absolute title to her trade-mark "Hunyadi" and to her red and blue label by first adoption and use.

2d. That she is further entitled to protection of the same by reason of the registration of her name "Hunyadi" as a trade-mark in the United States Patent Office, and by the treaty between the United States and Austro-Hungary of the year 1872.

3d. That neither she nor her predecessor, Andreas Saxlehner, ever abandoned this trade-mark and label and never intended to abandon it.

4th. That neither he nor she ever induced the defendant or any infringer in the United States to believe that he or she had abandoned it.

5th. That the Apollinaris Company, Limited, had no power to abandon any rights for complainant or her predecessor.

6th. That neither complainant nor her predecessor in business were at any time guilty of laches, but exerted themselves to maintain their trade-mark rights.

7th. That the name and label used by the defendants were fraudulently contrived for the purpose of enjoying the benefit of the reputation enjoyed by complainant's water.

8th. That neither the name, nor the label, have become generic or public property.

9th. That complainant has unjustly suffered from an unfortunate condition of the law in Hungary which was taken advantage of by defendants in an unconscionable manner.

10th. That the acts of the defendants are a fraud not only upon complainant, but also upon the public.

11th. That there exists no reason either in law or in equity why the complainant should not have the same relief in this country which is accorded to her in all other civilized countries.

Defendants' seal brand label does not excuse the fraud.

Upon this point the Circuit Court, as we respectfully submit, fell into an error. If it was the defendants' intention to palm off the water as Saxlehner's "Hunyadi Janos" water, as the Circuit Court found to be proved, it cannot be assumed that the defendants changed this intention by afterwards adding to the label the small "seal brand" which did not entirely or for the greater part cover up the original label, but left it exposed to the eye as before, with the exception of part of one side of the bottle. Whenever bottles of this kind stand in a show-window or upon the shelves of a store, this additional seal label may not be visible to the eye at all. The proofs in the case show very clearly that the fraudulent substitution which is going on with the "Hunyadi Matyas" water is practised with this very water which bears the seal label, showing therefore beyond a question that the seal label in fact does not assist in preventing deception. All this proof of deception, of which the case is full, with very few exceptions, refers to bottles bearing this very label, as defendants have pasted it upon every

one of their "Hunyadi Matyas" bottles for several years past.

The intention of defendant company in adopting this additional label apparently was not to differentiate from, but rather to further imitate complainant's label, which at that time was used by the Apollinaris Company with the additional red diamond label. In the same manner the defendant company followed the change made in the label of Saxlehner in 1890, by the addition of a blue strip between the ends of the label (R., pp. 542-3) by soon thereafter pasting a similar strip in the same place. (R., pp. 399-400). The Circuit Court of Appeals expressed at the argument its disapproval of the position taken by Judge Shipman upon the seal brand label and cut short any further argument on the same with the statement that in its opinion the seal brand label would not exempt the red and blue "Hunyadi Matyas" label from the charge of infringement. Its opinion as finally rendered made any mention of this label unnecessary. Neither the excuse that the name "Hunyadi" is solely used as a prefix, nor that the "Seal Brand" label was adopted to differentiate, is entitled to any consideration. If such excuses were usually listened to in trade-mark cases, imitators would have a very easy and wide course to steer without punishment.

Hutchinson v. *Covert*, 51 *F. R.*, 832; *G. G. White Co.* vs. *Miller*, 50 *F. R.*, 277; *Dunbar* vs. *Glenn*, 42 *Wisc.*, 118; *Lever* vs. *Goodwin*, 36 *Chan. Div.*, 1.

Complainant is entitled to an accounting of the damages and profits besides an injunction.

Defendant's infringement dates from the time of its incorporation in 1893. Previous to that and since

1890 its predecessor had carried on a similar business, but that predecessor is not a party to the suit, having been dissolved. For that reason complainant can obtain relief by way of an accounting from the defendant company only since 1893.

Peremptory notice threatening suit was given to defendant company in the fall of 1896, and this suit commenced a few months thereafter. Since then the defendant has in no way changed its labels or mode of advertising, but has openly defied the complainant and invited a difficult and lengthy litigation.

Although as a rule the want of knowledge of complainant's exclusive claims is not a defense to a claim for damages (*Colman* v. *Crump*, 70 *N. Y.*, 573; *Dale* v. *Smithson*, 12 *Abb.*, 237), such want of any intention to commit a fraud may often bear strongly upon the question whether an account of damages or profits should be decreed or not. This is, however, quite different where, as in the present case, defendants' doings leave no doubt that the adoption of their second label was a deliberate attempt to steal complainant's trade under cover of an alleged foreign protection, and this manner of sale was aggravated by continued false representations. Where such an intention is manifest, the Courts have never hesitated to decree an account of profits and damages even after a delay of many years in enforcing plaintiff's rights. A leading case of this kind was decided by the late Mr. Justice Blatchford when still on the bench of the Circuit Court (*Collins* v. *Oliver Ames & Sons Corporation*, 20 *Blatchf.*, 542). In this case it was found that the object of Oliver Ames & Sons in putting the stamp "Collins & Co." on their shovels was to avail themselves of the reputation and market created by the plaintiff for its articles, and while it appeared that defendant continued to do a large business in such shovels for about twenty-five years, the complainant was held entitled to a perpetual injunc-

tion and an account of profits and damages. This case has been frequently cited approvingly, and presents a far stronger case for the defendants than the present litigation (see *Estes* v. *Leslie*, 27 *F. R.*, 22; *Celluloid Manfg. Co.* v. *Read*, 47 *F. R.*, 712; *Funke* v. *Dreyfus*, 34 *Louisania Annals*, 80; *Fullwood* v. *Fullwood*, 9 *Ch. Div.*, 176; *McLean* v. *Fleming*, *above cited*).

The point was argued below by defendants that, until the expiration of its contract in March, 1896, the Apollinaris Company, Limited, was the only party entitled to sell in this market and therefore the only party whose trade could be injured by defendants' infringement. This argument may go to the measure of damages, but not to the principle of awarding damages. Complainant's trade suffered a diminution by every simulating bottle substituted by the defendant, and her trade suffered undoubtedly largely by reason of defendants' sales. It may be that the amount of profit which she would have made by the enhanced quantity will not be the same as if she had sold the bottles directly in this market, but she certainly lost as much again as she would have made under her contract with the Apollinaris Company. We see no reason why she should not recover from the defendant company the damages which she has suffered at its hands since 1893.

In conclusion

we urge upon this Court that by the decisions of the Courts below grave injustice has been done to this complainant. The situation created by the decision of the Circuit Court of Appeals is hard to bear. If it is to be the law of this country henceforth that by such imputation of laches of a commission house selling the product, the owner of the trade-mark might lose his property and right in the trade-mark against his will and without his knowledge and in

spite of his continued efforts to sustain his rights, demands will be made upon the owners of trademarks which are unusual and not understood by the public. If the unfortunate decision of the Court below should be sustained, the complainant might as well leave the market of this country to the unscrupulous imitators of her name and label and confine her efforts to the rest of the world where her rights are recognized and respected. She cannot hope to supplant the name "Hunyadi" as the name of her water by another name, nor is it to be expected that the public will ever give up demanding "Hunyadi" and lay stress on the "Janos," which for nearly thirty years past has been slighted as unimportant. But this will mean the destruction of a business built up during a lifetime and representing hundreds of thousands of dollars, and it will mean that the public of this country is to be delivered over to the hands of those who always stands ready to prey upon the unwary. There would be no reason why everybody else might not use the same name and label, and instead of two or three imitations as exist now, we may have twenty or thirty within a short space of time Nobody could tell any more from what spring or well the water offered under that name might come, and nobody could complain if he received for "Hunyadi" Water a water of entirely different origin, description, quality, and perhaps of no medicinal qualities at all. The decision below sanctions the perpetration and continuation of a pronounced fraud. It, in effect, licenses everybody who wants to reap an unjust gain by a fraudulent imitation of the well known dress and popular name of the "Hunyadi Janos' Water in this country to do so, and invites all unscrupulous persons to take advantage of the situation.

We submit that this decision, which was rendered by two Justices of the Court, the third being disqualified, having adjudged the cases below, is

opposed to the familiar doctrine of equity, that laches of the owner of a trade mark in seeking relief is no defense to the issue of an injunction forbidding the further perpetration of a fraud upon the public and upon the complainant; and that it is opposed to the law and to the undisputed facts of the case, and is so manifestly against the established rules of equity that it should be reversed.

Respectfully submitted,

JOHN G. JOHNSON,
ARTHUR V. BRIESEN,
ANTONIO KNAUTH,
Of Counsel for Petitioner and Appellant.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

SIEGEL-COOPER COMPANY,
Defendant-Appellee.

The bill of complaint in this case charged the defendant generally with unlawfully selling bitter-water under labels simulating Saxlehner's blue and red label and under the name "Hunyadi." There was no charge of any intentional fraud. The answer was substantially the same as that of the Eisner & Mendelson Company, and the case was defended by the same counsel and the same record of proofs presented.

Proof of sale of a bottle of "Hunyady Matyas" water with the red and blue label and of a bottle of "Hunyady Lajos" water with a similar label was furnished by complainant's witness William Stempel. These bottles were sold on January 15, 1897, when defendant's saleswoman told Stempel that the "Janos" was the genuine, but the "Matyas" water was just as good, but cheaper (Record, p. 85). The "Hunyady Matyas" water purchased by Stempel was that form which has a large number 3 on the label and purports to be a weaker water by the analysis on the bottle.

Further proof of infringement was furnished by the witness Toscani. He purchased on January 22, 1897, similar bottles of "Hunyady Matyas" and "Hunyady Lajos" water, the company having displayed signs with the inscription "Hunyadi Water" (Record, p. 112).

A similar advertisement was published by the defendant in March, 1898, and complainant's witness Eugene Eble went to its store to inquire what they advertised by publishing "Hunyadi Water, 14 cents." He found that this advertisement related to the "Hunyady Matyas" water. The saleswoman produced a bottle of "Hunyadi Janos" water when he asked for a bottle of "Hunyadi Water" and also a bottle of "Hunyady Matyas" water. "I asked her "which was the genuine Hunyadi water and she "said that the one was bottled in this country and "the other in Europe: that they were both from "the same source." Witness purchased a bottle of each, and was charged twenty-five cents for the "Hunyadi Janos" and seventeen cents for the "Hunyady Matyas" (Record, pp. 233-6, and page 294).

This evidence was amply sufficient to prove infringment (*Stetson* vs. *Brennan*, 21 *App. Div.* (*N. Y.*), 554). These charges are not denied by the defendant Siegel-Cooper Company.

Objection was made by defendant's counsel to the evidence of Toscani and Eble that it related to transactions which happened after the bringing of the suit, which is not the case with reference to the purchases testified to by Toscani; but even as to the testimony of Eble we submit that it was competent and proper, because in suits of this kind it is always material to ascertain how a defendant has conducted himself with reference to the matter of infringment and how the infringment has continued, and upon that ground evidence of such further acts of sale by defendant is usually received by the courts.

We do not mean to charge the shop-girl with an intentional fraud. She probably drew the same conclusions which any honest person would draw from the identity of the name and label—that the waters came from the same spring; but the constructive fraud in law is clear. And more than that—the published advertisements of "Hunyadi Water,"

not Hunyady Matyas, clearly showed that the defendant intentionally used the reputation of complainant's water to attract customers to its store, to sell them the imitation for less than the genuine and in place of the genuine.

The Circuit Court dismissed this case, without costs to either party, saying:

> "There is no substantial evidence of fraudulent conduct on the part of the Siegel-Cooper Company, and the bill is dismissed, without costs" (Record, p. 628).

A final decree dismissing the bill was entered (Record, p. 631), and the petition of appeal and assignment of errors to the Circuit Court of Appeals are found on pages 644 and 642 of the Record.

The opinion of the Circuit Court of Appeals does not mention this case, but upon it a decree was entered affirming the decree of the Circuit Court as to the name "Hunyadi," but modifying it so as to dismiss the bill as to the red and blue label, with costs of the appeal to the defendant (Record, pp. 660, 661). It was undoubtedly the intention of the Circuit Court of Appeals by this decree to sustain the decree of dismissal entered in the Circuit Court *in toto*. This was its practical effect.

The appellant's assignment of errors filed in the Circuit Court of Appeals upon appeal from the decree of the Circuit Court, contained the following:

1st. That the Court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2d. That the Court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3d. That the Court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

4th. That the Court erred in holding that the trade-mark or name "Hunyadi" of the complainant had been abandoned.

5th. That the Court erred in holding that the trade-mark or name "Hunyadi" of the complainant had been abandoned by her or by any person or party acting for or representing or authorized to act for her or her predecessor in interest, Andreas Saxlehner.

6th. That the Court erred in not granting the complainant the costs of the suit.

7th. That the Court erred in so far as it failed and refused to grant the complainant the relief demanded by the bill and each and every part thereof (Record, pp. 642, 643).

The principal questions relating to the controversy, having been fully discussed in our principal brief in the case against the importers, the Eisner & Mendelson Company, and so far as the "Hunyady Lajos" water sold by this defendant is concerned, in our brief against the importer of this water, Alexander Nielsen, we will confine ourselves to those points which are not treated in those briefs and are relevant to the controversy against this defendant only.

If we are right in our contentions, the complainant had established an exclusive right to the name "Hunyadi" and to the name "Hunyadi Janos" as a trade-mark for bitter water, and likewise an exclusive right to the use of her red and blue label bearing the medallion portrait and general characteristics as to print and arrangement of designs.

It is not claimed by this defendant, or at least,

there is no proof offered, that this defendant had sold the infringing articles for a long time, or was acquainted with the former litigations or with the circulars of the Apollinaris Company. The question of *laches* or *equitable estoppel* is therefore eliminated from this case, unless these defenses have been established in the suits against the importers.

It is also not questioned that the defendant advertised "Hunyadi" without distinguishing epitheton, and then sold to the purchasers the cheaper imitation. By each sale of the imitation it supplanted a sale of the genuine water and caused direct damage to complainant. No proof has been offered in this or any other case that the word "Hunyadi" when used alone did not at all times refer to complainant's water *in the minds of the public*. That it always did, and still does, have that meaning, is overwhelmingly shown by the proofs. Under these circumstances, even if this defendant was not guilty of an *actual* fraud, it committed a constructive fraud with every act of sale, for which it should account to the complainant.

Proof of fraudulent intent is not necessary to make out a case of infringement where the infringement itself is clear. The injury is neither greater nor less by the knowledge of the defendant. The infringement of defendant is an invasion of plaintiff's right of property, and as such entitles plaintiff to relief.

McLean v. *Fleming*, *supra*.
Coleman v. *Crump*, 70 *N. Y.*, 573.
Blackwell v. *Wright*, 73 *N. C.*, 310.

The "Hunyady Matyas" water sold by this defendant was sold under the same labels described in the case against the principal importer, and the "Hunyady Lajos" water is the same as more fully treated in the case No. 716 against defendant Alexander Nielsen. Both by the color and arrangement of that label and by the use of the name "Hunyady Lajos" thereon the complainant's rights have been

invaded. The bottles bearing these several labels were sold at greatly reduced prices, aggravating the injury to complainant's business. All this was done after the defendant had received a formal notice advising it of complainant's exclusive claims and of its intention to sue infringers, which was served upon the Siegel-Cooper Company in October, 1896 (Record, p. 107, also p. 252).

A defendant who, after receiving notice of complainant's rights, defies them and continues to infringe, should not be heard to say that his acts before such notice were innocent. Furthermore, the registration of Saxlehner's trade-mark in the Patent Office was notice to all of his exclusive rights. The defendant has not come forward to testify that it had no such knowledge and acted innocently, and therefore all the presumptions are against it and are not disproved.

The present case, therefore, is not one in which the defendant invested his money in the infringing article in the honest belief that complainant had no claim or rights in the matter, but is without defense at law and without excuse in equity. The proof of infringment being clear and complete and complainant's title having been amply shown, she was entitled to a decree in accordance with the prayer of her bill of complaint.

Upon these grounds we respectfully pray that the decree of the Circuit Court of Appeals be reversed; that the Circuit Court be instructed to enter a decree in favor of complainant in accordance with the prayer of the bill of complaint, and that complainant be awarded her costs in this court and in the courts below.

Respectfully submitted,

JOHN G. JOHNSON,
ARTHUR V. BRIESEN and
ANTONIO KNAUTH,
Of Counsel for Petitioner and Appellant.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

RUDOLPH GIES,
Defendant-Appellee.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

LOUIS MARQUET,
Defendant-Appellee.

These two cases are entirely similar and were similarly disposed of by the Circuit Court. They were brought against retailers for unlawful sale of the imitating waters under the name and the label of the "Hunyady Matyas" water furnished by the Eisner & Mendelson Company. The Circuit Court found as a matter of fact that the defendants Rudolph Gies and Louis Marquet had severally palmed off the "Hunyady Matyas" water *as and for "Hunyadi Janos" water*, and granted an injunction against such fraudulent acts, but refused to grant an injunction against the use of the name "Hunyady Matyas" or against the use of the red and blue labels under which that water was sold. Holding that these fraudulent sales "were probably not large enough to justify the expense of taking an account," the Court denied an account of damages or costs.

The decrees which were entered in these two cases in the Circuit Court are found on pages 631 and 632 of the Record. Complainant's petitions of appeals to the Circuit Court of Appeals and assignments of errors are found on pages 646 and 649 in the case against Gies, and on pages 651 and 654 in the case relating to Marquet. The decrees entered upon the decision of the Circuit Court of Appeals are found on pages 661 and 662.

By these decrees the decree of the Circuit Court was "affirmed as to the name Hunyadi; but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendant" (R., pp. 661 and 662). What was meant by these decrees is not clear, as the Circuit Court had not enjoined the use of any labels, but enjoined only the committing of fraudulent sales. For the purposes of this appeal, however, this is immaterial, as the intention of the Circuit Court of Appeals clearly was to deny the complainant any relief on account of the imitation of her label and her trade-mark "Hunyadi"; and this was the effect of its decree.

The finding of fact of the Circuit Court with reference to these fraudulent sales was fully supported by the evidence, and as the defendants did not appeal from the decrees against them is not open to question.

Chittenden vs. *Brewster*, 2 *Wall.*, 191, 196.
The Quickstep, 9 *Wall.*, 665, 672.

The evidence brought against these defendants also proved very clearly that the red seal label adopted by the Eisner & Mendelson Company was used by retailers to pass off the water as the red diamond brand of Hunyadi, thus assisting in the imposition.

Complainant's witness Shulman demanded a bottle of "Hunyadi Janos, Red Diamond," and received a

bottle of "Hunyady Matyas" with the red seal brand of the Eisner & Mendelson Company (Record, p. 103). Complainant's witness Osterman had exactly the same experience at the store of Gies, also demanding a bottle of "Hunyadi, Red Diamond," receiving a bottle of "Hunyady Matyas" with the red seal brand (Record, p. 92).

P. L. Focardi also received a bottle of "Hunyady Matyas" water with the red seal label at Gies' store in December, 1896, when he demanded a bottle of the red diamond brand of "Hunyadi" water (Record, p. 224).

The evidence of infringement in the case against Louis Marquet is furnished by the witnesses Samuel Ginsburg (Record, p. 97), and Samuel Shulman (Record, p. 101). It is of the same nature as the evidence against Gies.

All these sales were made after these defendants had received notice from complainant's attorneys of complainant's rights and claims and intention to sue (Record, p. 107).

The defendants, beyond denying the charge of fraud, offered no defense except such as was made by the Eisner & Mendelson Company in the principal case. They did not claim to have had any knowledge of the prior history of "Hunyadi," but continued the sale of the imitation upon receipt of the guarantee circular issued by the importer.

It is perfectly plain that they sold the infringing waters because they could be had more cheaply than the genuine water, and that they sold this infringing water at the same price at which the genuine "Hunyadi" water was sold to the public, thus making an enhanced profit on the article, in selling it not only on the reputation of the "Hunyadi Janos" water, but directly as and for "Hunyadi Janos" water, which was demanded.

The evidence relating to these two defendants, above referred to, furnishes complete proof of the fraudulent designs of the originators of the imitat-

ing labels and the success with which their scheme of fraud was carried out by unscrupulous retailers. The importers advertised to the *trade* (and to the trade only) that they furnished a water which, by means of the similar label and the name "Hunyady Matyas," could be palmed off upon the public as the "*Hunyadi*" water of the complainant, and the low price charged for it tempted the retailer and undermined his moral convictions. When the Apollinaris Company adopted a red diamond to distingush its genuine water from the imitations, the imitator adopted a red seal so that the druggist could say, "One is the red diamond brand and the other the red seal brand of Hunyadi, but they are both Hunyadi and equally genuine." Finally, when every druggist was personally informed of complainant's rights and claims, the retailers defied her under written guaranty of the importer and continued to impose upon the public in the expectation that the importer (which assumed the defense of these suits) would see them safely out of it.

It is in this manner that the water of the "*Franz Deak*" spring, which had no market in this country, has been sold to uninformed consumers as the complainant's "Hunyadi water," and that the enormous sums spent by the complainant for the advertisement and general introduction of her commodity have been made to enrich the perpetrators of the fraud. We cannot describe the nature of the scheme better than by quoting the words of Jenkins, *C. J.*, from the opinion of the Circuit Court of Appeals in Pillsbury *vs.* Pillsbury-Washburn Flour Mills Co. (64 F. R., 841, 849), where he says:

"*They sell their goods with the false and simulated brand upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the retail dealer their mode of procedure and their object. They appeal to the greed of their*

customers to purchase an inferior quality of flour thus falsely branded with the name of a superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good-will. In the large, bold displayed words, 'Pillsbury's Best' and 'Pillsbury's Best XXXX.,' they addressed the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. True representations in aid of false ones, but aggravate the fraud."

The assignments of error filed in the Circuit Court of Appeals from the decrees of the Circuit Court in these two cases, and principally relied upon, were the following:

1st. That the Court erred in refusing to grant an injunction against the defendant enjoining him from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

3d. That the Court erred in refusing an injunction enjoining the defendant from the use of the name "Hunyady Matyas" upon such bitter water.

4th. That the Court erred in refusing to grant an injunction enjoining the defendant from the use of the red and blue Hunyady Matyas label when used in connection with the Seal Brand label of the Eisner & Mendelson Company.

5th. That the Court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

6th. That the Court erred in holding that the trade mark or name "Hunyadi" of the complainant had been abandoned.

10. That the Court erred in not granting the complainant the costs of the suit.

Record, pp. 646 and 647, and 651 and 652.

All the matters relating to these several assignments of error have been fully treated in our principal brief, excepting the question of an accounting and costs in the present cases against the defendants Marquet and Gies. If, as we respectfully submit, the decrees of the Circuit Court and Circuit Court of Appeals in these cases were wrong, complainant was undoubtedly entitled not only to the injunction prayed for in her bill of complaint in its fullest sense, comprising both the name "Hunyadi" alone or in any combination whatever, and also the red and blue label, whether used with or without the "Red Seal" of the Eisner & Mendelson Company, but was also entitled to an accounting of damages and the costs of the suits against these two defendants. Both defendants were acquainted with complainant's trade mark and label, had notice of complainant's exclusive claims by the fact of her registration of trade-mark in the United States Patent Office, and having been shown to have committed an actual fraud, are estopped from claiming that they acted with innocent purpose in the sale of the imitating water. Common honesty was sufficient to tell them that a label, which was so manifestly designed in color and general appearance, and in the use of the name "Hunyadi" in imitation of complainant's "Hunyadi Janos" water, could not be lawful. Their persistence, after being directly notified of complainant's claims, shows them to have acted with evil intent throughout. Their gains by the sale of the imitating water have been unjust and fraudulent, for which they should account to the complainant in damages.

It is for these reasons that we ask a reversal of the decree of the Circuit Court of Appeals, with

costs, in all Courts, and with instructions to the Circuit Court to enter decrees in these two cases in accordance with the prayer of complainant's bills of complaint in the same.

Respectfully submitted,

JOHN G. JOHNSON,
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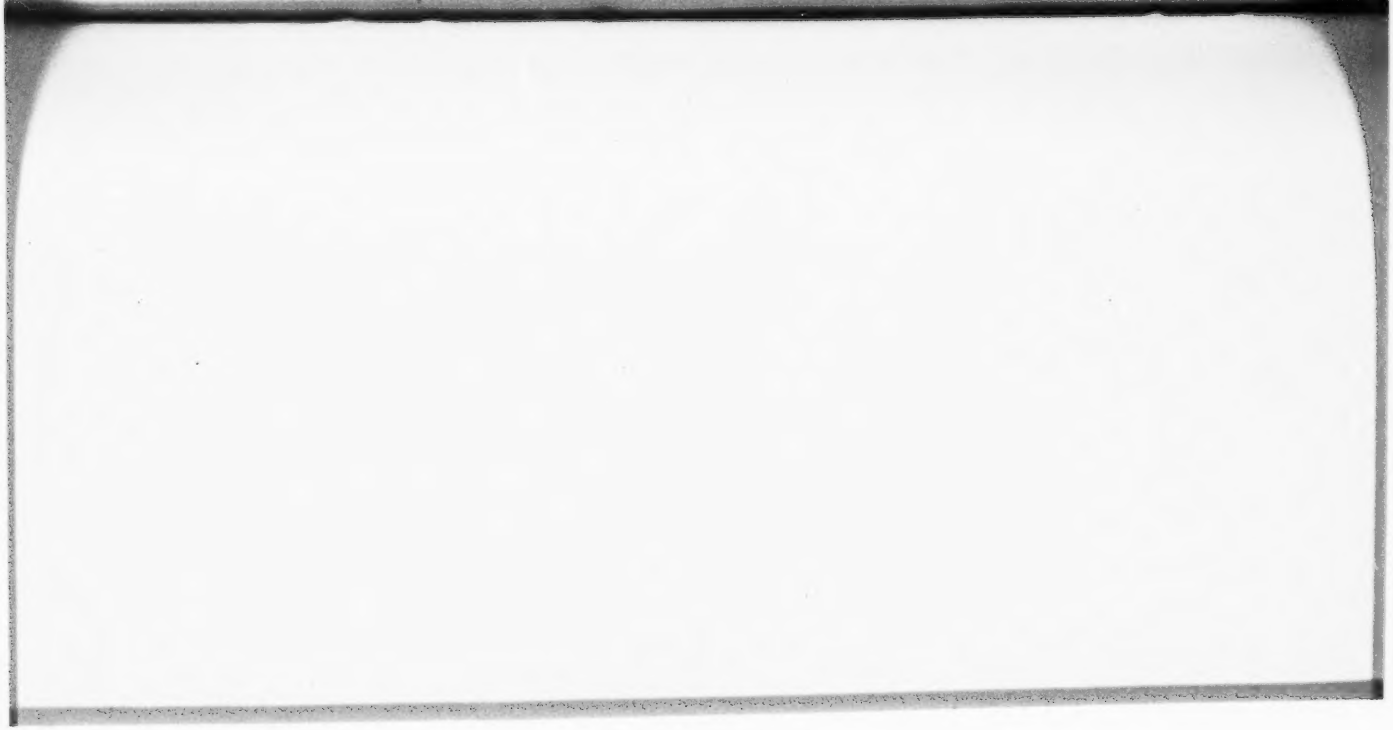

No. 244.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Office Supreme Court U. S.
FILED
MAR 22 1900
JAMES H. MCKENNEY
Clerk.

Reply Brf. of Johnson, Dyer & Knauth for Petitioner.

Filed Mar. 22, 1900.

Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

vs.

EISNER & MENDELSON CO.,
Respondent.

No. 211.

PETITIONER'S BRIEF IN REPLY.

Of the numerous decisions on the question of laches discussed in the brief of respondent's counsel only a few require comment on our part. The authorities relating to that defense in cases other than trade-mark cases have been so thoroughly and exhaustively reviewed in the recent case of *McIntyre* v. *Pryor*, 173 *U. S.*, 38, that it seems to us unnecessary to call them again to the attention of this Court. The only cases which deal of principles relating to trade-marks, referred to by respondent's counsel in this connection, are *Prince's Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 *F. R.*, *page* 938, and *Coates* v. *Merrick Thread Co.*, 149 *U. S.*, *page* 562.

The case of *Prince's Metallic Paint Co.* presented facts from which it was exceedingly doubtful

whether the complainant had any title to the trade-mark in question, such title being also claimed by the defendant. Indeed, the opinion of the Court seems to have been that defendant had the better title. Under such circumstances the complainant's acquiescence, continued for eight years, in defendant's use of the mark, was held to operate as an estoppel to the assertion of such title. The case is mainly distinguished from the "Hunyadi" controversy in this, that the defendant claimed title to the mark honestly and under certain proceedings which might invest him with such title, that the defendant's doings were free from the taint of fraud, and complainant showed no reason to excuse the delay of eight years in asserting his claim.

The case of *Coates* v. *Merrick Thread Co.*, 149 *U. S., page* 562, involved only a slight infraction of complainant's trade-mark rights, which could be asserted in that case only by the application of very stringent principles. There was no charge of fraud proved or made. Complainant had acquiesced in defendant's use of the spool heads complained of for twelve years without protest, and without ever raising the question of the legality of such use. In that case there was ample opportunity for the complainant to assert these rights, and in view of the small and unsubstantial character of the imitation complained of, this Court came to the conclusion that there was no equity in the complaint.

The argument by which respondent's counsel seek to bring the present controversy within the line of authorities discussed by them, is based upon premises for which there is no proof in the record. The claim is made that the name "Hunyadi" had become GENERIC in Hungary for bitter waters when the labels in question were adopted. *There is no basis in fact for such a contention.* Respondent's brief states, at considerable length, portions of

Ungar's affidavit filed in the suit of the Apollinaris Company in the year 1887, but it goes without saysaying that the mere *ex parte* assertions of Ungar, who was not examined as a witness, do not prove facts, nor is there any proof that the name "Hunyadi," as distinguished from the longer names Hunyadi Janos, Hunyadi Lajos, &c, was used in Hungary in the same manner as, in English speaking countries the name Hunyadi became the colloquial name of complainant's bitter water.

This defense, that the name Hunyadi had become a generic name in Hungary, was raised by all the parties against whom Mrs. Saxlehner commenced proceedings in Hungary in 1891, and the Court will find it discussed at great length in the various Hungarian decrees referred to in our principal brief. This settled the question in controversy in favor of the complainant, and there is nothing in the record of this case to the contrary aside from the *ex parte* statement of Ungar referred to as evidence by respondents. During all this time there were honest waters and honest labels in Hungary and also dishonest waters and labels. The claim that the name Hunyadi had become a generic name in Hungary was immoral and fraudulent in its very nature as shown by the fact, that every one who asserted it resorted also to a fraudulent imitation of Saxlehner's red and white label with its peculiar tripartite division, medallion portrait, combination of colors and other significant detail.

Respondent's argument is further based upon the fact claimed but not proved, that previous to the activity of the Apollinaris Company, Saxlehner had no rights to his name or label in this country for which he would have been entitled to protection. Exactly the contrary has been proved.

The bill of complaint, in paragraph 7, states that the water was exported to this country and received the name "Hunyadi" before the contract with the Apollinaris Company was made. The proofs have

amply shown this, and so far as the legal protection of Saxlehner in the exclusive enjoyment of the name Hunyadi is concerned it could not make any difference whether the water was afterwards more largely introduced and sold in this country. The same is true of the label, which was only changed by adopting a blue ground for the white ground, leaving the red centre field and all the designs thereon as they were before 1876.

The statement in defendant's brief referring to Eisner's first label in red and white colors used on Mattoni's Royal Hungarian Bitter Water, found on page 22 of respondent's brief, is not exact. It is apt to convey the impression that the name Hunyadi Matyas was contained on that label in small print. As a matter of fact it did not. If this label was copied from a German label which contained the words "Hunyadi Matyas Quelle," then Eisner was careful to avoid this name. Eisner had then not yet "investigated the matter" whether he could use the name Hunyadi in the United States with impunity.

Respondent's counsel discuss at length the point that complainant failed to prove that she had no knowledge of the doings of imitators of her name and label in the United States. We have shown in our brief that there is no proof of knowledge on her part of these matters, but we respectfully submit that even should she have had full knowledge of these infringements, she selected the best and most efficient method to stop the further use of the fraudulent names and labels. All these imitating labels were put on the bottles in Hungary by the persons owning and controlling the springs, and from Hungary they were sent out to all parts of the world. If complainant undertook to sue and enjoin the sellers of these imitating waters in France or Spain or Italy or the United States or anywhere else, she had to meet the plausible looking defense that the bottles were labeled in Hungary

and that she should proceed against the originator of the labels rather than the innocent dealers in the waters. She had no means to find out that the Eisner & Mendelson Company claimed some sort of title to the label under which they sold Mattoni's water and *had all reason to believe that if she stopped Mattoni she would thereby stop the Eisner & Mendelson Company* and every other seller of Mattoni's water. This has been the practical effect of her proceedings in Hungary with reference to all waters and in all countries, excepting the defendants in the present suits. With the same degree of justice could a dealer in San Francisco claim, even after the Eisner & Mendelson Company had been enjoined, that *he* had not been notified of any protest of complainant against *his* sales and claim for himself the benefit of the defense of laches. Eisner's lease of the "Franz Deak" Spring, which he fraudulently called "Hunyadi Matyas No. 2," was not recorded in Hungary, but was a mere private document produced for the first time in this suit. Neither was the Eisner & Mendelson Company to be found in Hungary, so that service of process upon it could be had there. Nothing short of an actual suit against the Eisner & Mendelson Company would have been sufficient under the decision of this Court in *Lane & Bodley Co.* v. *Locke*, 150 *U. S.*, 193, to keep alive her rights, if she could lose them by not proceeding at the same time against this vendor of the water, and this suit she could not safely bring until after the year 1895, and eventually until after the decisions of 1896. That the Eisner & Mendelson Company had early knowledge of the suits against the owners of the spring has been proved, and also that since Mattoni & Wille were prevented in Hungary from the further use of the label the water is now imported under small blueish labels bearing the name "Matyas" only, and that with full knowledge of complainant's trade-mark rights, the Hungarian decisions about the same, and with the knowledge

that they are palming off upon a credulous public the water of the "Franz Deak" well as "Hunyadi Matyas" Water, defendants continue to enjoy the benefits of the vast reputation of and demand for complainant's Hunyadi Janos Water.

Respectfully submitted,

JOHN G. JOHNSON,
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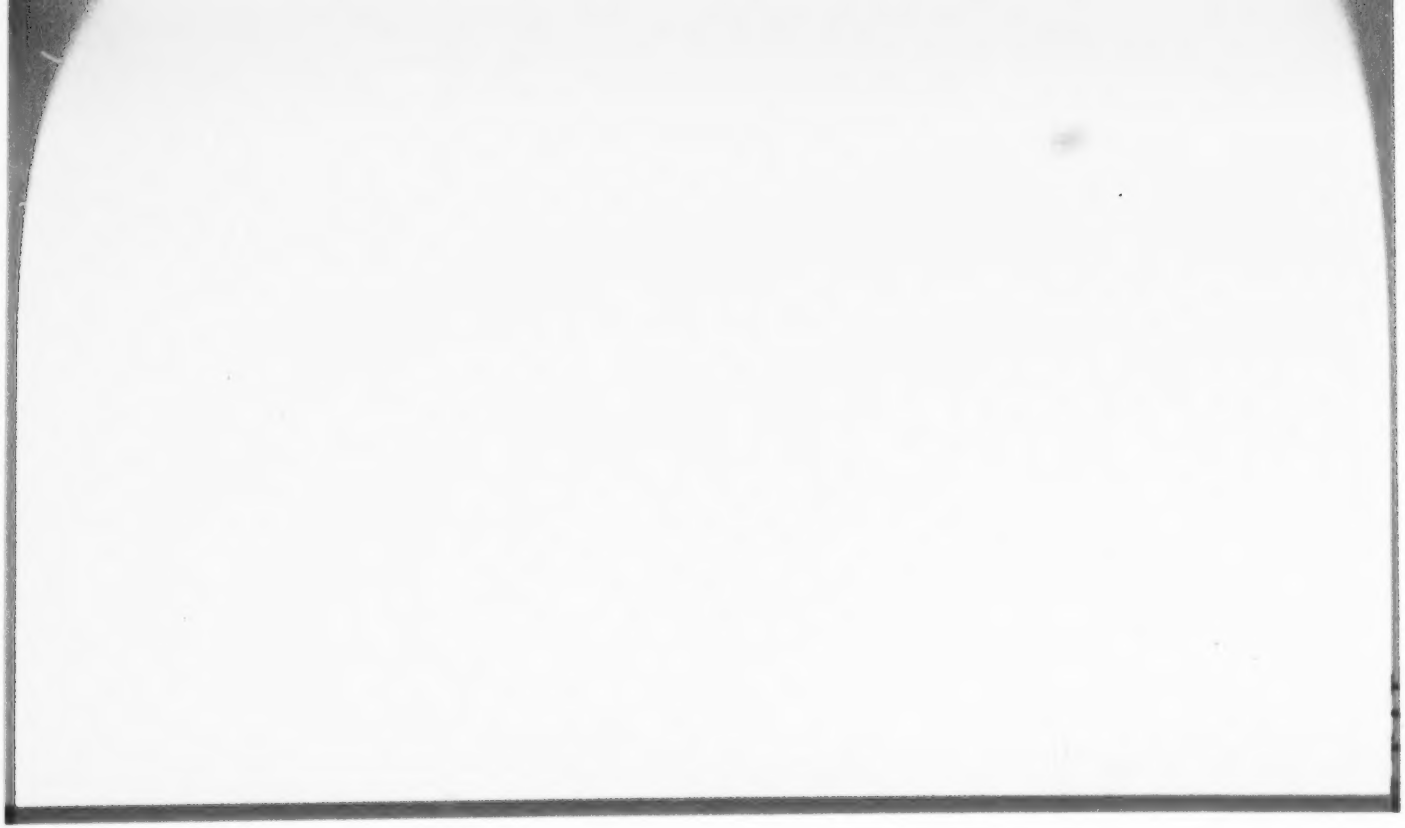
Of Counsel for Petitioner and Appellant.



Supreme Court of the United States.

October Term, 1898.

Filed Feb. 27, 1899.

EMILIE SAXLEHNER,

Petitioner,

vs.

EISNER & MENDELSON CO.

SAME

vs.

SIEGEL-COOPER CO.

SAME

vs.

RUDOLPH GIES.

SAME

vs.

LOUIS MARQUET.

BRIEF FOR RESPONDENT OPPOSING APPLICATION FOR WRIT OF CERTIORARI.

EDMUND WETMORE,

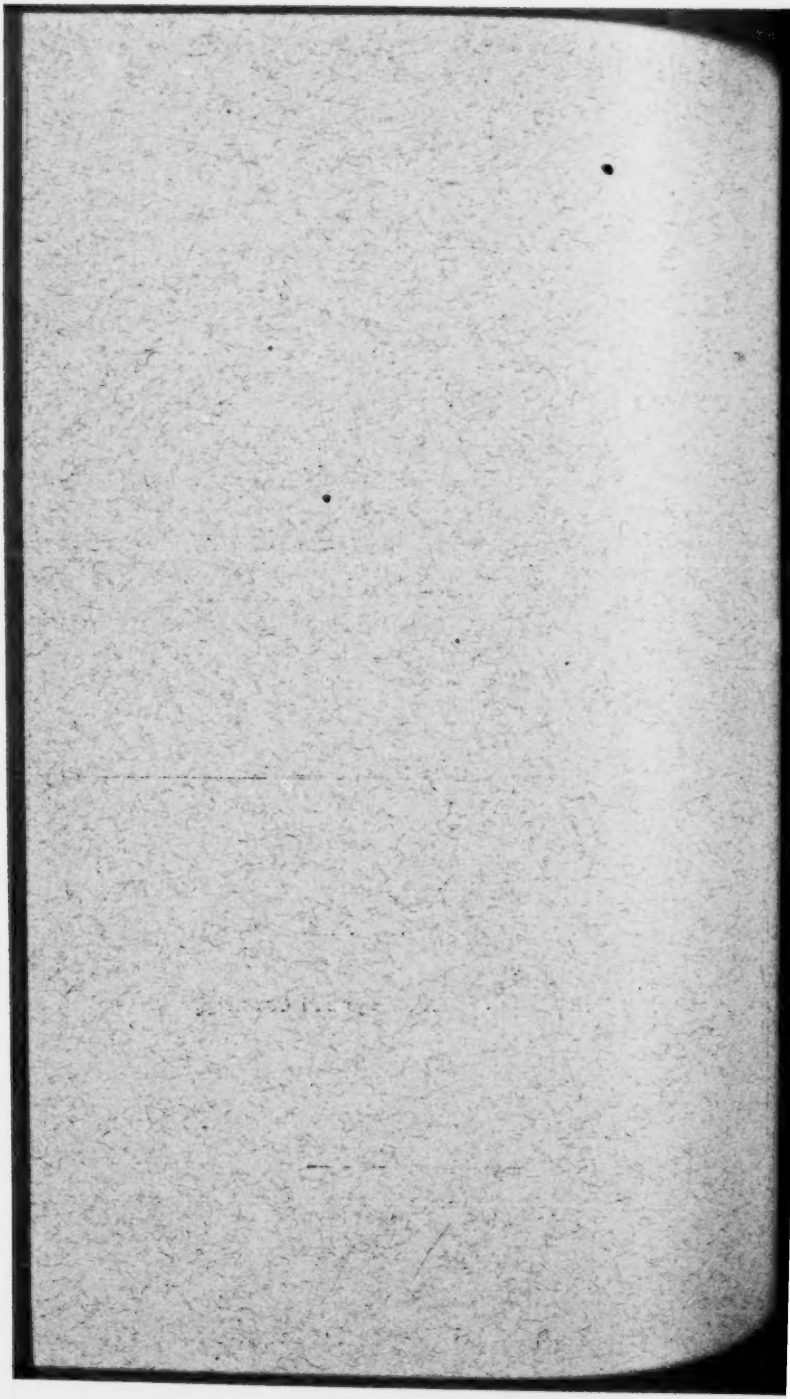
CHARLES G. COE,

Attorneys and Counsel for Respondent.

NEW YORK:

John Polhemus Printing Company, Printers and Mf'g. Stationers, 121 Fulton Street.

1899.



Supreme Court of the United States

OCTOBER TERM, 1898.

EMILIE SAXLEHNER, Petitioner, *In re* petition for a Writ of *Certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court for review and determination the case of

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

EISNER & MENDELSON COMPANY,
Defendant-Appellant.

SAME

vs.

SIEGEL-COOPER COMPANY.

SAME

vs.

RUDOLPH GIES.

SAME

vs.

LOUIS MARQUET.

Brief Opposing Petition for Writ of Certiorari.

The main reasons why the petitioner asks for the writ of *certiorari* on the ground of error by the Circuit Court of Appeals is contained in the Ninth, Tenth, Eleventh and Twelfth sections of the petition herein, and is substantially to the effect that said Court erred by deciding that laches of nine years' duration was sufficient to bar the right to an injunction; that said Court so decided on the supposed authority of *Menendez* vs. *Holt;* and that the action of said Court of Appeals in so holding, is opposed to the law as laid down in the previous case of *McLean* vs. *Fleming*; that said action of the Court of Appeals is also subversive of the rights guaranteed to the petitioner by the treaty between the United States of America and Austro-Hungary; and finally that the Court of Appeals committed grievous error in overlooking the action of the Hungarian authorities with regard to the word "Hunyadi" in 1896, which Hungarian litigation is substantially urged in the brief of petitioner as constituting a valid excuse for her non-action in the United States during the period intervening between 1888 and the Spring of 1897, when the suit herein was commenced.

With reference to these assignments of alleged error we contend that the Circuit Court of Appeals decision shows on its face, that the Court did not decide that mere lapse of time for nine years barred the right to injunctive relief, but that it was not only the delay for nine years, but such delay continued for nine years *under circumstances showing surrender and loss of rights by acquiescence which led the Court to its decision.*

A review of the Supreme Court authorities will also show that the decision of the Court of Appeals is not opposed to the law laid down in *McLean* vs. *Fleming*, *Menendez* vs. *Holt*, and subsequent decisions of this Court where all relief has been denied

on account of loss of rights by surrender and acquiescence.

It is true that the Supreme Court of the United States in the year 1887, in the suit of *McLean* vs. *Fleming*, 96 U. S. Rep., 245, laid down the general proposition that mere delay in bringing suit on a trade mark, while it will defeat the right to recover for past profits, will not ordinarily prevent injunctive relief.

In the year 1888, in the suit of *Menendez* vs. *Holt*, 128 U. S. Reports, 514, the Supreme Court was asked to reconsider the general proposition laid down in *McLean* vs. *Fleming*, but refused to do so. The Court, however, was very careful to state that this was a mere general proposition, and that the facts disclosed by the record in this suit of *Menendez* vs. *Holt* did not justify the Court in treating the case as an exception to the general rule.

The opinion of the Court makes it evident that in a case where proof of non-user of the trade mark by the owner, or surrender of the use to the public by acquiescence, or otherwise, is shown, it would unhesitatingly refuse injunctive relief.

A most excellent summary of the authorities bearing on this point is found in the suit of *Prince's Metallic Paint Co.* vs. *Prince Manufacturing Co.*, reported in 57 Fed. Rep., p. 938, in which case the Court denied complainant all relief on account of eight years' acquiescence. The Court says at page 944 of said report as follows:

"*Now, it is true that, where the plaintiff's title to a trademark is clear, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. Fullwood* vs. *Fullwood, 9 Ch. Div., 176; McLean* vs. *Fleming, 96 U. S., 245; Menendez v. Holt, 128 U. S., 514, 9 Sup. Ct. Rep., 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. Creath's Adm'r* vs.

Sims, 5 How., 192; Godden vs. *Kimmell, 99 U. S., 201; Lansdale* vs. *Smith, 106 U. S., 391, 1 Sup. Ct. Rep., 350. Again and again has it been judicially declared that nothing can call into activity a court of equity but "conscience, good faith and reasonable diligence." McKnight* vs. *Taylor, 1 How., 161; Sullivan* vs. *Railroad Co., 94 U. S., 806, 812. In McLaughlin* vs. *Railway Co., 21 Fed. Rep., 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. Ashhurst's Appeal, 60 Pa. St., 290, per Strong, J. In Lewis* vs. *Chapman, 3 Beav., 133, the Master of the Rolls refused an injunction to restrain the infringement of a copyright solely on the ground of six and a half years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. Browne, Trade-Marks, Sec. 497. Hence, in Manufacturing Co.* vs. *Garner, 55 Barb., 151, a delay of nine years in applying for an injunction to restrain infringement of a trademark was held to be good cause for refusing it"*

In the said suit of *Godden against Kimmell*, 99 U. S. Reports (1878), from pages 210 to 212, a summary of Supreme Court authorities is found in regard to the effect of laches and negligence in the assertion of alleged rights.

In *Galliher against Cadwell*, 145 U. S., 368 (1891), where plaintiff's claim was defeated on the ground of the inequity of enforcing it, the Court, at pages 372 and 373 of said report, 145 U. S., says as follows:

"*The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case be-*

comes an exact precedent for another, yet a uniform principle prevades them all. They proceed upon the assumption that the party to whom the laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned, and that because of the change of condition or relations during this period of delay, it would be an injustice to the latter to permit him to assert them."

Then follows a citation of Supreme Court cases in which laches of this description ranging from two to seven years was held fatal to the enforcement of the claim. At page 373 the Court then says as follows:

"*But it is unnecessary to mulliply cases. Nearly all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of permitting the inequity of the claim to be enforced and an inequity founded upon some change in the condition or relations of the property or parties.*"

In the subsequent suit of *Coats* vs. *Merrick Thread Co.*, 149 U. S. Rep., p. 562, the Court held that acquiescence of twelve years was sufficient to debar complainant from relief. The Court says as follows, at page 573 of said report:

"*Indeed, the intent to imitate plaintiffs' spool*
"*heads, if any such intent existed, is manifest*
"*rather in the label than in the periphery, but*
"*plaintiffs having submitted to this without pro-*
"*test for twelve years, have waived their right to*
"*relief upon this ground. McLaughlin* v. *Peoples*
"*R. Co., 21 Fed. Rep., 574; Ladd* v. *Cameron, 25*
"*Fed. Rep., 37; Green* v. *French, 4 Bann. & Ard.,*
"*169, 3 Robinson, Patents, Sec. 11-94.*"

The above review of authorities shows clearly that there are cases in which this Court has refused injunctive relief on the ground that the complainant

has lost all right to such relief by surrender and acquiescence.

Whether or not such right has been lost in any particular case is only a question of fact, and such is the present case. It presents no question of law, but purely one of fact, and the facts, as appears by the record, are voluminous. They are, as held by the Court of Appeals, fully rehearsed in the opinion of the Circuit Court. Of these facts, the most striking and conclusive are here set forth:

THE APOLLINARIS CONTRACT.

The first fact which is dwelt upon by the Court of Appeals as one of the circumstances accompanying the long continued delay which led the Court to its decision, is the contract made between the Apollinaris Company, Limited, with the predecessor of the complainant, and the agreements and actions of both parties connected therewith.

On February 8th, 1876, a contract was entered into between Andreas Saxlehner, the predecessor of complainant, and the Apollinaris Company, Limited, by which contract said company was granted the sole and exclusive right to sell the waters of the Hunyadi Janos Springs in all parts of the world except the continent of Europe and Smyrna.

In the exact language of the contract, Saxlehner "abandons" to the Apollinaris Company the exclusive sale of his Hunyadi Janos water within the prescribed territory.

By this contract it was further provided that Saxlehner was bound to refuse all orders for the Hunyadi Janos bitter water which he knew, or had good reason to suppose, were intended for places reserved for the Company by the said contract, and make over the same to the Company.

On its part the Company agreed not to introduce any other bitter water during the period of the contract. It was further agreed in said contract that the

Company should buy a specified number of bottles yearly, which Saxlehner agreed to sell at a specified price.

This contract was originally made for the term of ten years, beginning the first of January, 1876.

The parties proceeded under this original agreement for about a year, evidently to their mutual satisfaction, since on or about February 15th, 1877, the term of said contract was extended to fifteen years from January 1st, 1886—that is to say, substantially for the period of twenty-five years from February 8, 1876.

The contract further provided that the Apollinaris Company might terminate the same at any time during this period by giving twelve months previous notice. Saxlehner had no such right, so that the sole power to terminate the contract, prior to the expiration of its term, was given exclusively to the Apollinaris Company.

Such notice was given in the month of March, 1895, by the Apollinaris Company, and in pursuance of said notice the contract terminated on March 25, 1896.

Almost simultaneously with the making of this agreement, Saxlehner and the Apollinaris Company agreed to print the labels on the bottles which were sold to the Company in red and blue colors instead of in red and white, as Saxlehner used them on the continent of Europe.

In order to give all persons interested and the public generally, notice of the rights of the Apollinaris Company, the following notices were placed upon the labels: "Sole Exporters: The Apollinaris "Company, Limited, London." And also the following:

"Imitation of this water, or of the label, or of the "capsule, will be the subject to legal proceedings at "the instance of the Apollinaris Company, Limited, "19 Regent street, London.

"ANDREAS SAXLEHNER."

The evidence shows that on each and every bottle furnished by Saxlehner to the Apollinaris Company, labels were affixed at Budapest, having the words above quoted thereon.

For the purpose of still protecting the sale and right of the Apollinaris Company to the label and name, such label with the said words thereon was registered, and a trade-mark obtained for the name, "Hunyadi Janos" by Saxlehner in the United States on September 11, 1877.

It is further shown by the evidence that prior to the Apollinaris contract of 1876, the sales of Hunyadi Janos water in the United States were trivial, and such water was substantially unknown here. The water was introduced and made known to the people of the United States by the Apollinaris Company, all the expenses of such introduction and marketing being borne by the Company.

It is further shown that the said Hunyadi Janos water was extensively and exclusively advertised by the Apollinaris Company during the period of the contract at its own cost and without expense to Saxlehner.

Under these circumstances, it may well be held that it was the intention and design of both parties to the contract, that such contract and the agreements connected therewith, delegated to the Apollinaris Company all the powers, and vested such Company with all the rights in the prescribed territory for the period of the contract, which Saxlehner would have had if such contract had not been made, and which powers and rights he reserved to himself in his own territory.

If such be the interpretation of the contract, then the Apollinaris Company stood for Saxlehner, and was a principal in said territory for the period of the contract, and its action and failure to act were the action and non-action of Saxlehner. If, on the other hand, it be held, as the complainant strenuously contended, that the relations of the Apollinaris Company and Saxlehner during the period

of the contract were those of vendee and vendor, then, as the Court of Appeals says, Saxlehner was bound to know the situation in the United States with regard to the sale of Hunyadi water, and is chargeable alike with the actions and conduct and failure to act of the Apollinaris Company. In the one case, the Apollinaris Company was the principal for the period of the contract, and thus its action or non-action was Saxlehner's action or non-action, and in the other, Saxlehner was chargeable with the knowledge of what her vendee was doing or not doing in the United States.

It is obvious, that whatever the precise legal relations of the parties to the contract were, the Apollinaris Company was held out to dealers in mineral waters, all persons interested in the sale of Hungarian bitter waters, and the public generally, as the sole representative of Saxlehner in the United States, as the suppressor of infringements, and the only person with whom any one could deal during the period of the contract.

LOSS AND SURRENDER OF SAXLEHNER'S RIGHTS BY ACQUIESCENCE AND COMPLAINANT'S KNOWLEDGE OF SAME.

The remaining circumstances on which the Court of Appeals based its decision that all right to the name Hunyadi, and to the label, had been lost and surrendered by acquiescence, were the abandonment of the injunctions in the Hunyadi Matyas and Hunyadi Arpad suits in 1888; the adoption and use by the Apollinaris Company of the diamond mark, the free sale of the Hunyadi Arpad, Hunyadi Laszlo, and Hunyadi Bela waters after 1888, and the Hunyadi Matyas and other waters since 1890; the publication on April 6th, 1889, by the Apollinaris Company of the announcement with regard to the use of the diamond mark, which publication was continued in trade papers thereafter in 1889 and 1890, and the publication and widespread circulation by postal

cards to physicians, by circulars to the trade, and by advertisements in the trade papers and newspapers generally throughout the United States by the Apollinaris Company, of the announcement of 1893, that the word "Hunyadi" had become a generic or general name for Hungarian bitter waters; the entire absence of any protest to the public of the United States by Saxlehner against such acts, and her utter failure to either act herself or compel the Apollinaris Company to act for the period of nine years.

To the above facts and circumstances is to be added, that the evidence on the part of defendant shows, that during said nine years, the word Hunyadi and the red and blue label had become among dealers in mineral waters, the trade and the public generally, the general and generic name for Hungarian bitter waters, which had been imported and sold here under said name and label to the amount of hundreds of thousands of bottles a year.

These were some of the facts and circumstances, which accompanied by the long lapse of time, led the Court of Appeals to its decision. The said Court finds that the complainant is chargeable with the knowledge of these facts and circumstances, but it is shown by the evidence that not only is she chargeable with such knowledge, but that there are also circumstances, which prove clearly that she must have had actual knowledge so far as regards the sale of Hunyadi Matyas, Hunyadi Arpad, and Hunyadi Laszlo waters in the United States.

It is proved by undisputed facts that from 1890 to 1896, when the Apollinaris contract terminated, that the labels exhibiting the words "Hunyadi Matyas" conspicuously on their front, were affixed to the Hunyadi Matyas bottles at Budapest, where the Hunyadi Matyas springs were situated, and shipped thence to be sold here by the Eisner & Mendelson Co. under its 1890 lease.

The Hunyadi Arpad springs were also situated in Budapest, and from 1888, when the Hunyadi Arpad

injunction was abandoned, until 1893, when the Hunyadi Arpad springs were bought up by Saxlehner as hereinafter more particularly detailed, such Hunyadi Arpad water was shipped to the United States in bottles with the red and blue label affixed thereon such as had been used previous to the 1888 injunction, to be sold by the agents of the spring in this country.

The evidence shows that during those respective periods the yearly output of these "Hunyadi" waters, using said red and blue labels, which were sold without let or hindrance in the United States, amounted to hundreds of thousands of bottles.

It is impossible, therefore, to believe in the face of these facts, that the complainant and her predecessor having the Hunyadi Janos springs and their business establishment in the City of Budapest, did not know that such waters were being shipped under the red and blue label to the United States for sale here.

Indeed, so far as regards the sale of Hunyadi Matyas water, the member of the Saxlehner firm who testified in this suit, would not deny that said firm had such knowledge, for when asked whether the firm knew of the sale of Hunyadi Matyas water in the United States, said, "I don't know; *Maybe they knew.*"

This same witness testified that as early as 1891, complainant's firm knew that the Apollinaris Company was affixing to the bottles of Hunyadi Janos water sold by said Company, the diamond mark or brand, and that said Company continued to use the same during the remaining period of the Apollinaris contract.

The complainant, therefore, being familiar with the fact that the Apollinaris Company used the diamond mark on the red and blue Hunyadi Janos label, must also necessarily have acquired the knowledge and been familiar with the circumstances in the United States which made the use of this mark by the Apollinaris Company necessary, in

order to distinguish the Hunyadi Janos water from the other Hunyadi waters using the red and blue label.

But the most important fact which brings directly home to the complainant, her knowledge of of the sale of Hunyadi Arpad, Hunyadi Matyas and Hunyadi Laszlo waters in the United States, is her buying up the Hunyadi Arpad and Hunyadi Bela springs in the summer of 1893.

At this time the Eisner & Mendelson Co. were selling the Hunyadi Arpad and Hunyadi Bela waters under their red and blue labels, under an arrangement with Ungar, the owner of said springs, by which said company had been made the sole and exclusive seller of the same in the United States. They were also selling the Hunyadi Laszlo water by a like arrangement with its owner, and were selling the Hunyadi Matyas water under the 1890 lease, and had advertised such waters and themselves as exclusive sellers thereof in trade papers and in other ways.

On July 6th, 1893, the Hunyadi Arpad and Hunyadi Bela springs were bought by the complainant of Ungar, their owner, the springs closed, and the importation of these waters to the United States, to be here sold by the Eisner & Mendelson Company, stopped.

It was further shown that the price paid by complainant was two-hundred and twenty-five thousand florins (Fl. 225,000), or seventy-five thousand dollars ($75,000), ten thousand dollars of which, or its equal in value, being received by the Eisner & Mendelson Company for its contract.

The above circumstances taken together show either actual knowledge, or such a state of facts as must necessarily and inevitably have led the complainant to a knowledge of the situation with regard to the sale of Hunyadi waters during the period of the Apollinaris contract, from 1888 on, on which situation, the defendant relied for its defense, and on which the Circuit Court of Appeals founded its opinion.

THE AUSTRO-HUNGARY TREATY MATTER.

The petitioner's counsel claim substantially that the treaty provides that the reproduction of a trade mark forbidden in Austro-Hungary is forbidden in the United States; that the use of the word "Hunyadi" as a trade-mark by others than the complainant was not forbidden until 1896, and that until that time, the fact that it was not so forbidden in Austro-Hungary constituted a serious obstacle to suits against its use in this country, but that the moment that its use was forbidden in Hungary in 1896, the provision of the treaty applied, and its use became unlawful here, and that in a suit brought on such trade-mark in the United States thereafter, the defendant could not set up the defense of loss and surrender of rights by acquiescence during the intervening nine years.

This contention is completely disposed of by the Court of Appeals in its denial of the motion for a re-argument.

In addition to the reasons there given, there are other considerations which deprive the petitioner's contention of all force. There never was a moment when the existence of the treaty interposed the slightest obstacle to a suit in this country to enforce the trade-mark derived from *use* in the United States. The precise bill filed in this suit might have been filed against any person using the name or label ever since their introduction into this country through the Apollinaris Company in 1876. The registration of the word "Hunyadi" as a United States trade-mark in the year 1887, is stated in the bill of complaint, but the suit is not brought upon the registered trade-mark, nor to enforce a statutory remedy. It is brought to enforce an alleged common law right, pure and simple, and to prevent unfair competition. The treaty therefore, has no application.

Moreover, it is not possible to construe such treaty to mean that our Courts could abridge the rights of American citizens to set up the defense of

loss of rights by acquieseence on part of complainant because of any decisions given or laws passed in a foreign country. The treaty only gives to a citizen of Austro-Hungary the right to sue to restrain the infringement of a trade-mark here, "just as if the plaintiff were a citizen of this country." It does not give the Austro-Hungarian a right which a citizen of this country does *not* possess, or relieve him from the effect of acquiescence, which, under our laws would be fatal to his claim.

It is further to be noted that the suggestion that the rights of the party to this suit were affected by the treaty was never made in any manner or form, nor did it appear in any of the pleadings, evidence or briefs, *nor was it referred to in any argument throughout the entire litigation*, until brought forward by petitioner on motion for a re-argument in the Court of Appeals. This shows clearly that this treaty matter was a mere after thought to which the petitioner had theretofore attached no importance whatever.

But there is another fatal objection to the enforcement of any alleged rights under the treaty. The treaty provides that if "*the trade-mark has be-*" *come public property in the country of its origin,* "*it shall be equally free to all in the countries or* "*territories of the other of the two contracting* "*parties.*"

For some fourteen years prior to the year 1887, the evidence shows that the word "Hunyadi" had been used in Hungary, under the sanction of its laws, as a general name to designate springs of Hungarian bitter water belonging to other persons than the owner of the Hunyadi Janos Springs.

The beginning of such use of the word Hunyadi is well stated in a condensed form, by the Circuit Court in Judge Shipman's opinion as follows:

"*In 1873, one Ignatius Markus, the proprietor* "*of a spring of bitter water in Budapest, applied* "*to the City authorities for permission to call the*

"spring and its water by the name "Hunyadi "Matyas," and to register this name as a designa- "tion of the water. This application was success- "fully opposed by Saxlehner before the local "authorities, but the decision was reversed upon "appeal to the Minister of Agriculture, who held "that the two names were sufficiently distinct and "that it sufficiently appeared that the waters of "the springs were of the same quality, and granted "Markus' petition. Afterwards this spring was "registered in Budapest by the name of Hunyadi "Matyas."

After this decision, and prior to 1887, the Hunyadi Arpad, Hunyadi Laszlo, Hunyadi Erzebet and Hunyadi Bela, as well as the Hunyady Matyas waters were sold freely in Hungary under these designations.

From the above, it is clear that the word "Hunyadi," was not the sole and exclusive property of the Saxlehner firm, but had become the common designation of a number of other springs by the direct authority and sanction of the Hungarian trade mark authorities.

The evidence further shows that in 1888, the motion to vacate the injunction in the Hunyadi Arpad suit was made by the defendant Ungar on this very ground, namely, that the word "Hunyadi" had, prior to that time, become a general and generic name in Hungary, and that it was in view of the history of said word in Hungary as embodied in the affidavits filed to vacate, that the Apollinaris Company failed to contest, and discontinued the Hunyadi Arpad and Hunyadi Matyas 1888 injunctions, and abandoned the suits.

We contend, therefore, that if the treaty is to be considered at all, the above facts are fatal to its application in this suit.

THE AUSTRO-HUNGARIAN DECREES.

It is also claimed by the petitioner that the Courts below have overlooked or disregarded the asserted facts, that the Minister of Commerce in Hungary struck from the registry of trade marks, in the year 1894, all pictorial trade marks bearing the words Hunyady Matyas, Hunyadi Laszlo, etc., and that in 1896, struck from the registry, the word trade-marks, Hunyady Matyas, Hunyadi Laszlo, Hunyadi Lagos, and a number of other designations using the word Hunyadi, which trade marks had all been registered under the law of 1895 allowing their use.

The decrees of this Minister were a complete reversal of the policy which the Hungarian Government had pursued for the previous twenty years, during which time it had allowed the names, so decreed to be unlawful, to be used as designations of the respective springs, and by permitting their registration under the existing Hungarian trade mark statutes, had legalized and sanctioned their use.

All these so-called decrees are therefore in the nature of ex post facto laws and are to be regarded in the light of mere edicts of a particular Minister, based upon the intricate regulations and rules of Hungarian trade mark law, which cannot be made to apply in any way to the common law of this country.

In addition to this, it is to be observed, that on petitioner's own statement, as early as 1894, the Minister of Commerce had forbidden the use by his decree, of the pictorial trade mark Hunyadi Matyas in connection with its label, whether printed in red and blue or red and white colors. The petitioner could, therefore have at once brought suit in the United States, for unfair competition, against the use of the Hunyadi Matyas label bearing the words Hunyady Matyas on its front, and brought in evidence the fact that such label and the use of the word Hunyadi Matyas in connection therewith was

forbidden in Hungary, but not only did the petitioner fail to bring suit, but also failed to act in anyway in 1894, and waited until after the new law of 1895 in relation to word trade marks had been passed, under which the entire group of Hunyadi springs was allowed registration, and further delayed any action in the United States until after the edict of the Minister had struck the word trade marks Hunyady Matyas, etc., from the registry.

The petitioner can give no valid excuse for this continued delay to take action in the United States during this period running three years, from some time in the year 1894 until the spring of 1897.

It is, however, wholly immaterial that by an *ex post facto* law, or ministerial decree, Saxlehner was allowed a trade mark in *Hungary* which had been for twenty years public property in that country.

Our courts cannot enforce the laws of a foreign country—least of all can they even recognize them where they are repugnant to the very fundamental principles of our jurisprudence. To assume for a moment, that our courts would revive an extinct trade mark in this country because such extinct trade mark had been revived in Hungary, is too manifestly unreasonable to require serious discussion.

For the above reasons, the introduction of the Hungarian decrees in evidence and testimony relating to them was duly objected to by the defendant's counsel as immaterial and irrelevant to the issues in this case, and such decrees were not considered by the Courts below as important factors in reaching their conclusions.

There are various other statements made in the petition and brief herein which we wish briefly to notice.

In the thirteenth assignment of errors set forth in the petition, it is alleged substantially that the public health is in danger by the sale of the Hungarian bitter waters under the red and blue label and using the name Hunyadi, and will be so endangered in the future.

We can best judge the future by the past, and there is not a particle of evidence in the record to show that during the years that have passed since 1888, when the free sale of Hunyadi waters began in this country, the health of any person has been in danger from their use. All the Hungarian bitter waters sold under the name Hunyadi, have as their principal constituents sulphate of magnesia and sulphate of soda. The other ingredients contained in these waters are so slight as to constitute no factors in the case.

The Hunyadi Janos water is drawn from about 112 springs, in all of which sulphate of soda and sulphate of magnesia are the main ingredients. All the Hunyadi waters are therefore alike in their effects, and these effects are due to the common cause of the presence of these substances as natural ingredients in solution. The percentages of the above substances in the various Hunyadi waters vary within limits, and according to such percentages, these waters are richer or poorer in aperient qualities, but they are all perfectly harmless in their effects, and cannot, therefore, in any way endanger the public health.

So far as regards the use of Hunyadi Matyas water in this country and its value as an aperient, it is shown by the evidence that such water obtained the highest award for excellence at the Columbian Exposition in 1893, and that up to 1896, 1,700,000 bottles of such water had been sold in the United States, and there is no evidence of any deleterious effects resulting from their use.

It is stated in the brief of petitioner that the uncontradicted testimony of fifteen physicians in the case shows that the word Hunyadi in this country still means Hunyadi Janos water, and that Judge Shipman substantially finds this fact on such testimony.

These physicians only testify substantially that they have known Hunyadi Janos water for years and prescribed it for their patients as Hunyadi

water. A careful reading of their testimony makes it clear that they have generally prescribed it in an informal way, by telling the patient to get a bottle of Hunyadi water. The fact that such physicians supposed that the patient on going to a drug store and asking for Hunyadi water, would, during the last ten years, be sure to get Hunyadi Janos water, simply shows their ignorance of what had been going on in the mineral water and drug trade, and of the true situation.

The true situation is shown by the trade evidence produced by the defendant and embodied in the record, which makes it clear that the mineral water trade of the United States had understood for eight years that no one person was entitled to the exclusive use of the word Hunyadi, and that neither buyers or sellers have known any water by the single word Hunyadi, and that by custom and usage the trade had come to know such word as a generic name for Hungarian bitter waters generally, and that in writing and speaking had distinguished such Hunyadi waters from each other by emphasizing the words "Janos," "Matyas," "Arpad," "Laszlo," "Bela," "Lajos," with which the generic word "Hunyadi" is associated.

The petitioner's counsel state in their brief substantially, that the record teems with instances of deception, and specify one particular instance as follows: "the effrontery of the principal defendant "went so far as to advertise the Hunyadi Matyas "water as the *Original* Hunyadi Water."

This refers to the fact that the complainant found one or two advertisements in trade papers speedily discontinued, in which advertisements, the Eisner & Mendelson Co. had characterized the Hunyadi Matyas water as "the original Hunyadi water of superior quality, introduced to the trade at low prices," which was a fact. The only complaint made in the Courts below by complainant was, that the words "Original Hunyadi Water" were printed in more conspicuous type than the remainder of the

sentence. The complaint now is, substantially, that the defendant printed these words without the qualifying words above quoted, which is not the fact.

All the remaining instances of alleged deception in regard to advertisements, etc., urged on the Courts below were fully explained by the defendant's evidence and shown to be unintentional, and not deceptive when explained. They nearly all relate to the early stages of the sale of Hunyadi Matyas water by the Eisner & Mendelson Co., and were discontinued within the two years running from 1890 to 1892. Although all these alleged deceptions were fully known to the Apollinaris Company, they made no protest or objection, except in one particular. In the spring of 1892, the Eisner & Mendelson Co. circulated advertisements of the Hunyadi Matyas water, showing a comparative analysis of the Hunyadi Janos, Hunyadi Arpad and Hunyady Matyas springs. This analysis was objected to by the Apollinaris Company as unfair to the Hunyadi Janos water, and after such objection, and on the request of the Apollinaris Company such advertisements were discontinued.

As found by Judge Shipman, "The Apollinaris "Company during the continuance of its Saxlehner "contract did not object to the Eisner & Mendelson "Company's operations or trade-marks, or repre-"sentations, except in one particular, which was "changed at the former's request."

The above facts show plainly the willingness on the part of Eisner & Mendelson Co. to correct anything which was regarded as unfair in its advertisements, and the circumstance that the comparative analysis was the only matter objected to by the Apollinaris Company, makes it evident that the other alleged misrepresentations, either could not be objected to, or were too trivial to warrant attention.

The attempt is made in the latter part of petitioner's brief to give the Court the impression that in England and in other countries, there has been litigation with reference to the word Hunyadi, and

that the right of the complainant to the sole and exclusive use of such word has been sustained in such litigation.

In England and other countries with the exception of Hungary and the United States, no Hunyadi waters other than the Janos water, were imported or sold during the period of the Apollinaris contract, and therefore, in these countries, there being no competition, "Hunyadi" or "Eau de Janos" have been the alternative designations for Hunyadi Janos water.

In England, after the termination of its contract, the Apollinaris Company designated a spring owned by it in Hungary as "Apenta," devised a label and made a part thereof, the "Diamond Brand," which they had used on Hunyadi Janos water during the contract. On the label also appeared the words "Uj Hunyadi," meaning new Hunyadi. Suit was thereupon brought in England by the complainant to suppress the use of these words and the Diamond Brand on the Apenta label, on the ground that by the action of the Apollinaris Company during the period of the contract in using the said Diamond mark, and the fiduciary relations created by such contract, the use of the Diamond mark and the words "Uj Hunyadi" should be suppressed. The English courts refused to grant an injunction against the use of the Diamond mark, but enjoined the Apollinaris Company from the use of the said words, on the ground of the fiduciary relations of the Apollinaris Company during the period of the contract, and because the word Hunyadi had never been lost in England, there being no substantial competition of other Hunyadi waters there, and the state of affairs being the exact opposite of the situation in the United States, where the sole and exclusive right to the word had been lost by acquiescence.

We are confident that it has been shown, that the record herein does not present such a case as is required by this Court to warrant the grant of the *writ of certiorari.*

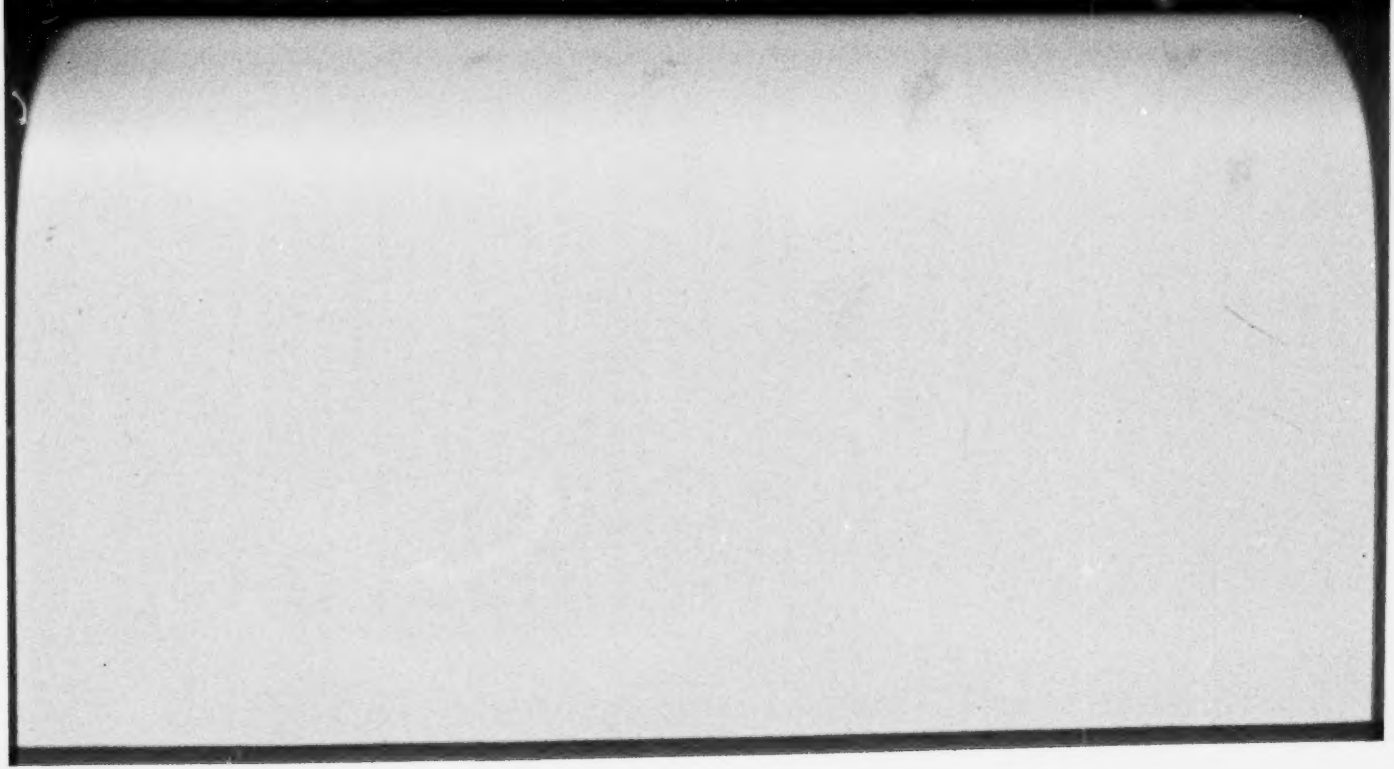
The Court says as follows, with reference to the grant of the *writ of certiorari* in suit of *American Construction* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. Rep., p. 383–384:

"*In the same spirit, the authority conferred on "this Court by the very provision on which the "petitioners mainly rely by which it is enacted "that 'in any such case as is hereinbefore made "final in the Circuit Court of Appeals, it shall be "competent for the Supreme Court to require, by "certiorari or otherwise, any such case to be certi-"fied to the Supreme Court for its review and deter-"mination, with the same power and authority in "the case as if it had been carried by appeal or "writ of error to the Supreme Court,' has been held "to be a branch of its jurisdiction which should "be exercised sparingly and with great caution, "and only in cases of peculiar gravity and general "importance, or in order to secure uniformity of "decision. Re Lau Ow Bew, 141 U. S., 583 and "144 U. S., 47; Re Woods, 143, U. S., 202.*"

We, therefore, submit that the application of the petitioner for the *writ of certiorari* should be refused.

Respectfully submitted,

EDMUND WETMORE,
CHARLES G. COE,
Attorneys and Counsel for Respondent.



Brf. of Wetmore & Coe for Respondent

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Supreme Court U. S.
FILED
MAR 19 1900
JAMES H. McKENNEY,
Clerk.

Filed Mar. 19, 1900.

EMILIE SAXLEHNER, PETITIONER,

vs.

EISNER & MENDELSON COMPANY.

No. 212.

EMILIE SAXLEHNER, PETITIONER,

vs.

SIEGEL-COOPER COMPANY.

No. 213.

EMILIE SAXLEHNER, PETITIONER,

vs.

RUDOLPH GIES.

No. 214.

EMILIE SAXLEHNER, PETITIONER,

vs.

LOUIS MARQUET.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

EDMUND WETMORE,
CHARLES G. COE,
Of Counsel for Respondent.

18988-John Polhemus Printing Company, 121 Fulton Street, N. Y.

Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

against

EISNER & MENDELSON COMPANY,
Respondent.

The United States Court of Appeals for the Second Circuit dismissed the Bill of Complaint in the above cause, and the Bills of Complaint in the subsidiary causes referred to in the Brief of Petitioner, on the ground that undisputed facts showed such a delay of nearly nine years on the part of complainant in bringing suit, accompanied with such acts of surrender and acquiescence as to bar the right to injunctive relief.

THE APOLLINARIS CONTRACT.

The first fact to which we call the attention of this Court, and which is dwelt upon by the Court of Appeals as one of the circumstances accompanying the long continued delay which led the Court to its decision, is the contract made between the Apollinaris Company, Limited, with the predecessor of the complainant, and the agreements and actions of both parties connected therewith.

On February 8th, 1876, a contract was entered into between Andreas Saxlehner, the predecessor of complainant, and the Apollinaris Company,

Limited, by which contract said company was granted the sole and exclusive right to sell the waters of the Hunyadi Janos Springs in all parts of the world except the continent of Europe and Smyrna.

In the exact language of the contract, Saxlehner "abandons" to the Apollinaris Company the exclusive sale of his Hunyadi Janos water within the prescribed territory.

By this contract it was further provided that Saxlehner was bound to refuse all orders for the Hunyadi Janos bitter water which he knew, or had good reason to suppose, were intended for places reserved for the Company by the said contract, and make over the same to the Company.

On its part the Company agreed not to introduce any other bitter water during the period of the contract. It was further agreed in said contract that the Company should buy a specified number of bottles yearly, which Saxlehner agreed to sell at a specified price.

This contract was originally made for the term of ten years, beginning the first of January, 1876.

The parties proceeded under this original agreement for about a year, evidently to their mutual satisfaction, since on or about February 15th, 1877, the term of said contract was extended to fifteen years from January 1st, 1886—that is to say, substantially for the period of twenty-five years from February 8, 1876.

The contract further provided that the Apollinaris Company might terminate the same at any time during this period by giving twelve months previous notice. Saxlehner had no such right, so that the sole power to terminate the contract, prior to the expiration of its term, was given exclusively to the Apollinaris Company (Record, pp. 237–240).

Such notice was given in the month of March, 1895, by the Apollinaris Company, and in pursuance of said notice, the contract terminated on March 25, 1896.

Almost simultaneously with the making of this agreement, Saxlehner and the Apollinaris Company agreed to print the labels on the bottles which were sold to the Company in red and blue colors, instead of in red and white as Saxlehner used them on the continent of Europe.

In order to give all persons interested and the public generally, notice of the rights of the Apollinaris Company, the following notices were placed upon the labels: "Sole Exporters: The Apollinaris "Company, Limited, London." And also the following:

"Imitation of this water, or of the label, or of the "capsule, will be the sublect to legal proceedings at "the instance of the Apollinaris Company, Limited, "19 Regent street, London.

"ANDREAS SAXLEHNER."

The evidence shows that on each and every bottle furnished by Saxlehner to the Apollinaris Company, labels were affixed at Budapest, having the words above quoted thereon (Record, pp. 215–216).

For the purpose of still protecting the sale and right of the Apollinaris Company to the label and name, such label with the said words thereon was registered, and a trade-mark obtained for the name, "Hunyadi Janos" by Saxlehner in the United States, on September 11, 1877. (Record, p. 616).

It is further shown by the evidence that prior to the Apollinaris contract of 1876, the sales of Hunyadi Janos water in the United States were trivial, and such water was substantially unknown here. The water was introduced and made known to the people of the United States by the Apollinaris Company, all the expenses of such introduction and marketing being borne by the Company.

It is further shown that the said Hunyadi Janos water was extensively and exclusively advertised by the Apollinaris Company during the period of the contract at its own cost and without expense to Saxlehner.

Under these circumstances, it may well be held that it was the intention and design of both parties to the contract, that such contract and the agreements connected therewith, delegated to the Apollinaris Company all the powers, and vested such Company with all the rights in the prescribed territory for the period of the contract, which Saxlehner would have had if such contract had not been made, and which powers and rights he reserved to himself in his own territory.

If such be the interpretation of the contract, then the Apollinaris Company stood for Saxlehner, and was a principal in said territory for the period of the contract, and its action and failure to act were the action and non-action of Saxlehner. If, on the other hand, it be held, as the complainant strenuously contended, that the relations of the Apollinaris Company and Saxlehner during the period of the contract were those of vendee and vendor, then, as the Court of Appeals says, Saxlehner was bound to know the situation in the United States with regard to the sale of Hunyadi water, and is chargeable alike with the actions and conduct and failure to act of the Apollinaris Company. In the one case, the Apollinaris Company was the principal for the period of the contract, and thus its action or non-action was Saxlehner's action or non-action, and in the other, Saxlehner was chargeable with the knowledge of what her vendee was doing or not doing in the United States.

It is obvious, that whatever the precise legal relations of the parties to the contract were, the Apollinaris Company was held out to dealers in mineral waters, all persons interested in the sale of Hungarian bitter waters, and the public generally, as the sole representative of Saxlehner in the United States, as the suppressor of infringements, and the only person with whom any one could deal during the period of the contract.

Origin of the name "Hunyadi" in the United States, and its use prior to 1888, when the right thereto was lost by acquiescence.

In the year 1887 the Apollinaris Company brought an action in the Supreme Court of New York against one Andres, for infringement of the name "Hunyadi," and the use of the red and *white* label, a similar suit being brought against Joseph Ungar for the use of said name, in connection with the red and *blue* label. In the Andres' suit, the defendant used the designation "Hunyadi Matyas," and in the Ungar suit, the designation "Hunyadi Arpad." Injunctions were obtained in both suits, and in 1888, on affidavits being filed in the Ungar suit and motion made to vacate the injunction, the injunctions in both suits were vacated and the suits themselves discontinued and abandoned.

The proceedings in these cases are set forth at length in the Record from 564 to 597.

These proceedings clearly show that the Apollinaris Company was granted and exercised the sole and exclusive right to sell, the absolute right to conduct the business of selling in its own way, uncontrolled in any respect by Saxlehner, the sole and exclusive right to the use of the trade-mark "Hunyadi Janos," and the label by and under which the water was sold, the sole and exclusive right to sue for infringements and, as necessarily incident thereto, the sole and exclusive right to the proceeds of any suits brought, whether by way of accounting or damages, and the sole and exclusive right to compromise, settle or discontinue such suits in any way the Company deemed advisable.

The proceedings in these suits further show that the name "Hunyadi" originated in the United States from the sale of the "Hunyadi Janos" water by the Apollinaris Company and its exertions to

introduce and market such water, and was not dependent on a technical trade-mark.

The facts set forth by the complaint in the Andres' suit and the proceedings in both suits, are especially valuable, because they occurred prior to the period when the exclusive rights to the label and trade-mark were lost, as hereinafter set forth, and when the Apollinaris Company had been exercising its exclusive rights under the contract for the period of about ten years.

The said complaint, after showing that the name originated by Andreas Saxlehner and used in Hungary was "Hunyadi Janos" (not "Hunyadi") proceeds to say as follows with regard to the label:

"That pursuant to said sale and grant, and to "regulate and protect the respective rights of the "parties thereto, a label for use in the United "States was devised and adopted, showing the "words 'Hunyadi Janos,' and also certain designs. "That said label has, at all times since the adop"tion thereof, been affixed to every bottle of said "water taken from said spring by or for the said "plaintiff, and transported to and sold in the "United States, and the following words in the "English language appear thereon: 'Sole Export"'ers: The Apollinaris Company, Limited, Lon"'don.'" And also the following:

"'Imitation of this water or of the label or of the "'capsule will be the subject of legal proceedings "'the instance of the Apollinaris Company, Limited, "'19 Regent street, London.'"

"*And the said Saxlehner, for the purposes above "stated, and especially for the purpose of giving "notice to the world of said grant, caused to be "registered in the Patent Office at Washington, "District of Columbia, the description and char"acteristic part of the said label affixed and adopt"ed as aforesaid, containing, among other things, "the said trade-mark 'Hunyadi Janos,' and the "words last above quoted.*" Record, pp. 567–578.

The trade-mark so referred to was registered, as we have stated above on September 11, 1877. As is seen both by the above statement and the trade-mark itself (p. 616), no claim was made to the word "Hunyadi" in and of itself, and such trade-mark gave notice to everyone on *the face of the label*, that the Apollinaris Company had the sole and exclusive right to the use of such *red and blue* label, was the sole and exclusive seller of the "Hunyadi Janos" water, and was given the right to sue for infringements. These facts are also most important because they negative completely the claim made in the brief of petitioner, that the contractual relations of Saxlehner and the Apollinaris were secret, and therefore no one could have relied on the acts of the Apollinaris Company as binding on Saxlehner. On the contrary, this 1877 trade-mark, which is set forth in petitioner's brief as the original basis of Saxlehner's rights in the United States, also gives notice "to the world" of the sole and exclusive rights of the Apollinaris Company to the trade-mark, label and water, and holds such company forth as the only firm to deal with, or interested in the matter. Such notice, as we have seen, also appeared on every bottle of "Hunyadi Janos" water sold in the United States from March 25, 1876, until March 25, 1896, when the Apollinaris contract terminated, not at the instance of Saxlehner, but at the instance of the Apollinaris Company. The Andres' complaint then goes on to state as follows, with regard to the introduction and sale of "Hunyadi Janos" water in the United States and the way in which the name "Hunyadi" came to be used here as designating "Hunyadi Janos" water:

"That previous to the said sale and the said grant "the said mineral water was comparatively but little "known in the United States, and was first generally "introduced therein and sold in large quantities by "the said plaintiff after said grant, and upwards of "nine years ago. That through the efforts, expendi-"tures and investments of the said plaintiff, the

"said water has become widely known in the United "States, and is at present sold therein by it and its "vendees in very large quantities.

"That by reason of the said sales by it, and the "said words upon the said label by it adopted as "aforesaid, dealers in mineral waters and the pur- "chasers and consumers of said waters generally, "have come to know, and have long known, that "the said plaintiff has the exclusive right in said "United States to furnish and sell the said mineral "water under the said trade-mark 'Hunyadi Janos,' "and under the said label.

"*That said water so sold has come generally to* "*be known and designated by the trade so called,* "*and by purchasers and consumers, by the first* "*and characteristic word of said trade-mark* "*'Hunyadi' the 'Janos' being comparatively* "*seldom used in common parlance.*"

It is thus plain, that the word "Hunyadi" was no technical trade-name, that it was not originally claimed by Saxlehner in his 1877 trade-mark, and that it's use as a designation of the "Hunyadi Janos" water arose in the United States not from any acts or conduct of Saxlehner, but solely from the acts and exertions of the Apollinaris Company in introducing and making known the water to the American public, and by trade usage and custom alone.

The above history of the origin of the word "Hunyadi" and its use in the United States as a designation for "Hunyadi Janos" water is substantially corroborated by the statements of the Bill of Complaint in the present suit.

The whole theory of the right of the complainant to the red and blue labels exhibiting the words "Hunyadi Janos," and to the bottles and capsules in and under which she now sells Hunyadi Janos water in the United States, is based solely on the claimed use of substantially the same label, bottles and capsules by the Apollinaris Company during the twenty years of its contract from 1876 to 1896.

Such red and blue label, as stated in section eight of the bill of the complaint herein, was especially devised to be used by the Apollinaris Company in the United States. Such label was not used by complainant's predecessor at all, and is not now used by complainant in Hungary.

It was through this label alone and by its use by the Apollinaris Company that the Hunyadi Janos water became known in the United States, as substantially stated in section nine of the Bill of Complaint herein, and it is only by and through its use by the Apollinaris Company, acting as and for Saxlehner during the twenty years of the contract, that the complainant now claims any rights at all to the label and name "Hunyadi Janos."

In the 13th section of the Bill of Complaint, such representative capacity of the Apollinaris Company is expressly recognized (Record p. 3).

The complaint there especially refers to the sale of Hunyadi Janos water in the United States, designating the Appollinaris Company as "*your Orators' Agents, as aforesaid.*"

It is apparent, therefore, that the complainant founds all her alleged rights to the label and to the word "Hunyadi," on the use by the Apollinaris Company, as her representative, of such label and word in the United States during the twenty years of the contract.

How, then, can the complainant repudiate the acts and conduct of the Apollinaris Company during the continuance of the contract, by which the defendant proves abandonment, surrender and acquiescence?

If the continuance of the use of the red and blue label by the Apollinaris Company as the representative of Saxlehner is relied on by the complainant to maintain her rights, how can she be heard to say that said Company was her representative to maintain only, and to disown such Company and repudiate the acts and course of conduct, on which defendant relies to prove that the use of the word

"Hunyadi" was not exclusive, and that the exclusive right to the red and blue label had been abandoned and its use by the defendant and the entire trade for nine years acquiesced in!

It is impossible to conceive of any more effective words or means or acts by which one party could give to another the sole and exclusive right to a business and the good-will of such business, and the label and trade-mark by which such good-will and business was evidenced. It is idle, therefore, for the complainant to contend, in view of these facts, that the acts of the Apollinaris Company, with reference to the business trade-mark and label which we shall set forth hereafter, did not bind Andreas Saxlehner and his successor, the complainant herein.

The adoption and use by the Eisner & Mendelson Company of the name "Hunyadi Matyas" and the red and blue label not fraudulent.

It is insisted by the Petitioner's Counsel that the red and blue label bearing the name of Hunyadi Matyas was deliberately adopted by the predecessor of the defendant corporation for purposes of fraud, and the counsel refer to a statement of Judge Shipman, to the effect that Mr. Eisner, the President of the Eisner & Mendelson Company intentionally simulated the Saxlehner United States label. This finding was not endorsed by the Court of Appeals, which only says, that "in 1890, the Eisner & Mendel-
"son Company began the sale of Hunyadi Matyas
"Water under labels closely simulating complain-
"ant's, and vigorously pressed the sale of it."

In order to make the acts fraudulent, it must be shown that the complainant had sole and exclusive rights in 1890 to the name "Hunyadi" and the red and blue label, and it can readily be seen that at the time when the Eisner & Mendelson Company went into the business of selling the Hunyadi Matyas

Water in the United States, Saxlehner had no such exclusive rights.

The defendant, the Eisner & Mendelson Company, is a West Virginia corporation, organized on or about April 13th, 1892, by the reorganization of its predecessor, a Pennsylvania corporation of the same name, organized in or about the year 1886.

The present West Viginia corporation succeeded to all the rights, contracts and liabilities of its predecessor, the Pennsylvania corporation, and commenced and has continued to do business under substantially the same officers and management, and in charge of the same interests.

The present corporation and its predecessor was, and is, the agent for the celebrated Carlsbad Sprudel Mineral Water and the salts derived therefrom, and also of the well-known proprietary preparation, Johann Hoff Malt Extract. Such corporations were also and are well known as mineral water dealers. (Record, p. 313.)

In the year 1889, the Eisner & Mendelson Company of Pennsylvania made a contract with Mattoni & Wille, the owners of the Hunyadi Matyas springs at Buda Pest in Hungary, a translation of which is set forth at page 550 of Record. This 1889 contract was preliminary to and was superseded by the 1890 lease, which is set forth at page 552 of Record, by which the Eisner & Mendelson Company leased one of the Mattoni & Wille Hunyadi Springs, called "Hunyadi Matyas Spring No. 2." This contract was entered into in the spring of 1890, and was to continue for five years, with the privilege of extension for twenty years if the Eisner & Mendelson Company gave notice of its desire to do so by the first day of June, 1895. At the time of entering into this contract, Mr. Eisner had made an investigation into the state of the Hunyadi Mineral Water business both at Buda Pest, Hungary, and in this country, and knew that substantially the state of facts both in Hungary and the United States as to the sale of Hunyadi was as follows:

First: In the year 1890 the word "Hunyadi" in Hungary, the country of its origin, instead of exclusively designating the Hunyadi Janos Springs, was used, under the sanction of the proper authorities, and by their express grant and license, to designate several springs situated in the neighborhood of Buda Pest, and the word by that time had become a generic term in the country.

As early as 1873, one Ignatius Markus applied to the Town Council of Buda Pest for leave to call a certain spring within the limits of that city "Hunyadi Matyas Medical Spring." Andreas Saxlehner, the owner of the Hunyadi Janos Spring, complained or objected to the Council that his claim to the exclusive right to the words "Hunyadi Janos" would be invaded by such a designation, and on Saxlehner's protest, the said Council decided in his favor. Markus then appealed to the Royal Hungarian Minister of Agriculture, Industry and Commerce, and such ministry reversed the decision of the Town Council, and decided that Markus had the right to call the spring "Hunyadi Matyas," on the ground that the name "Hunyadi Janos" and "Hunyadi Matyas" represented two quite different names, which might exist without any infringement of each other. (Record, p. 549.)

In 1877 Mattoni & Wille registered the said name "Hunyadi Matyas" as a designation of their springs situated in the city limits of Buda Pest, having acquired the ownership of the Markus Spring. In the fall of 1880 Ignatius Ungar obtained the privilege under the Hungarian laws to designate his Hungarian Aperient Spring, in the neighborhood of Buda Pest, under the name of "Hunyadi Arpad."

By the year 1886 there were five springs in the neighborhood of Buda Pest, all designated by the name "Hunyadi," viz: "Hunyadi Janos," "Hunyadi Arpad," "Hunyadi Laszlo," "Hunyadi Erzebet," and "Hunyadi Matyas." The waters of these springs were not only sold in Hungary under the said names, but also were sold in bottles and cap-

sules, similar to the Hunyadi Janos bottles and capsules, and under similar labels; such labels all have three divisions with a red central panel and medallion head thereon, with two white side panels or wings. (Record, pp. 579, 585, 592.)

Therefore, beginning with the year 1873, these various aperient springs in the neighborhood of Buda Pest, having similar constituents, were all selling under these names and labels. For several years prior to 1886 this had been going on, and the said name "Hunyadi," had thereby become generic and known, not as designating the Hunyadi Janos springs alone, but as designating this group of aperient springs in the city limits of Buda Pest. A specimen of the "Hunyadi Matyas" label, which Mattoni & Wille had been using to designate the waters of their group of springs, called "Hunyadi Matyas," is shown at page 39 of Defendant's Scrap Book. The label used since 1880 by Ungar to designate his spring or springs called "Hunyadi Arpad," is shown at page 29 of Defendant's Scrap Book. The label used by the owners of the "Hunyadi Laszlo" spring in the neighborhood of Buda Pest is shown at page 57 of the Defendant's Scrap Book.

All these springs, as testified to by Mr. Eisner, were selling in competition with each other and with the "Hunyadi Janos" water under these red and white labels, and with similar bottles and capsules; and the name "Hunyadi" was common to the said five springs, "Hunyadi Janos," Hunyadi Arpad," "Hunyadi Laszlo," "Hunyadi Erzebet" and "Hunyadi Matyas."

Second.—In the United States, the Apollinaris Company (which company had been given the sole and exclusive right to sell Hunyadi Janos water there, and the sole and exclusive right to the words "Hunyadi Janos," and to the red and blue label adopted by the express consent of Saxlehner to distinguish and define the rights and territory granted

to the Apollinaris Company from the rights and territory reserved to himself) had, in the year 1887, brought suit and obtained injunctions restraining the use of the words "Hunyadi Matyas" and "Hunyadi Arpad" and the use of the "Hunyadi Arpad" red and blue label, and the use of the "Hunyadi Matyas" red and white label, and after retaining such injunctions for over a year had voluntarily dissolved the said injunctions, and discontinued and abandoned the said suits, and such exclusive right to the word "Hunyadi" and the said labels, whether in red and white or red and blue colors.

Thereafter and since the termination of such litigation and up to the time in 1890 when the Eisner and Mendelson Company entered the field to sell Hunyadi Matyas water, Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo waters had been freely sold with the knowledge and the consent of the Apollinaris Company under the red and blue three-panel labels, in bottles and with capsules similar to those used by said company in selling Hunyadi Janos water.

The sales of the Hunyadi Arpad water had been especially large, amounting from the time the injunctions were vacated in 1888 to the time in 1890 when the Eisner & Mendelson Company entered into the Hunyadi Matyas business to between Three Hundred and Fifty to Four Hundred Thousand bottles. Record, p. 539.

Third.—The above being the state of the market with regard to the sale of the Hunyadi waters in the United States, in the Spring of 1889, the Apollinaris Company published an advertisement in the "Medical Record" of April 6th, 1889 (page 12, Defendant's Scrap Book), and continued to publish the same in further issues of the same periodical during the years 1889 and 1890. This advertisement is also printed in Record, at page 612. The advertisement reads as follows:

"The Apollinaris Company, Limited, London,
"beg to announce that, as numerous Aperient
"Waters are offered to the public under names of
"which the word 'Hunyadi' forms a part, they
"have now adopted an additional label comprising
"their Registered Trade Mark of selection, which
"consists of

"A RED DIAMOND.

"This label will henceforth also serve to distin-
"guish the Hungarian Aperient Water sold by the
"Company from all other Aperient Waters."

From this time on until the termination of the Apollinaris contract in 1896, as is admitted by the complainant, this diamond mark was invariably placed by the Apollinaris Company, on the Hunyadi Janos label, to thereafter distinguish the Hunyadi Janos water from all other aperient waters. This act of the Apollinaris Company in so distinguishing the Hunyadi Janos water from the other Hunyadi waters shows that not only to the knowledge of the said Company, were the Hunyadi Arpad, Hunyadi Bela and Hunyadi Laszlo waters on the market, all known under the generic term "Hunyadi," but also that, by the use of the diamond mark thereafter, the Company admitted that it not only made no claim to the exclusive right to the red and blue label devised in 1877 to protect the rights of the Company in the United States, but acknowledged that such red and blue label, as well as the word "Hunyadi," was the common property of the mineral water trade in the United States.

The abandonment of the Hunyadi Matyas and Hunyadi Arpad suits and injunctions in 1888 by the Apollinaris Company, the free sale thereafter of the Hunyadi Arpad, Hunyadi Laszlo and Hunyadi Bela bitter waters, all using the red and blue label, the adoption and the use for several years prior to 1890 by the Apollinaris Company of its red diamond mark to distingush the Hunyadi Janos water from

the other Hunyadi waters, and the announcement April 6th, 1889, and thereafter in the years 1889 and 1890, that the red diamond mark had been adopted for this purpose, are all facts on which the Eisner & Mendelson Company had a right to rely in the adoption and use of the Hunyadi Matyas label, and negative any idea of fraudulent intent on its part.

Fourth. There is another fact showing that there was no intent to clandestinely imitate the Hunyadi Janos label which is set forth in the record.

Mr. Joseph Mendelson, who was the Treasurer and one of the managers of the Pennsylvania Eisner and Mendelson corporation, states that in the year 1890, prior to the 1890 Mattoni and Wille lease, he called at the office of the Apollinaris Company in London, and saw Mr. Steinkopff, the President of the said Company, and notified him that the Eisner & Mendelson Company was about to go into the Hunyadi Matyas business in the United States, and had a conversation with reference thereto, and as to whether a friendly combination as to prices could not be formed. Mr. Steinkopff made no objection or protest to the Eisner & Mendelson Company entering into the business of selling Hunyadi Matyas water in the United States, but refused to enter into any combination, substantially on the ground that there were other Hunyadi waters in the market, and that, therefore, no arrangement of the kind would interest him (Record, pp. 692 to 694.)

This conversation shows that the officials of the Eisner & Mendelson Company before definitely closing their contract with Mattoni, gave direct and personal notice to the Apollinaris Company of their intention to sell Hunyadi Matyas water in the United States, and that the Apollinaris Company made no protest to such proposed action. This fact also negatives the idea of any fraudulent intent on the part of the Eisner & Mendelson Company to gain a portion of the good-will of the Hunyadi Janos business, since before entering into their new arrange-

ment with Mattoni, the officials of the Company were careful to ascertain that the Apollinaris Company, the only party having any rights in the matter, had no objections or protests to make.

This being the situation of the Hunyadi mineral water business in the United States in the spring of 1890, the Eisner & Mendelson Company entered into the business in reliance on this state of facts and situation, and, as lessee of the water of the said Hunyadi Matyas Spring, took steps to introduce such water to the people of the United States.

The steps taken to introduce the Hunyadi Matyas water to the people of the United States by the Eisner & Mendelson Company as lessee of the owner of the Hunyadi Matyas Spring are given in detail by Mr. Eisner from pages 320 to 329 of Record. This testimony shows that at the beginning of May, 1890, said company sent a circular letter to the drug and mineral water trade throughout the United States, notifying them to the effect that the said Company was the lessee of this spring, and enclosed a circular showing the label of the Hunyadi Matyas water as the said Company imported and sold it. Another circular like this first circular was then sent to the entire retail drug trade of the United States in towns over five thousand inhabitants, some forty or fifty thousand of such circulars being sent out; the first circular or notice being sent especially to the jobbing trade and mineral water dealers in general, and the second notice being sent out to retail drug trade. Specimens of these notices and circulars are set forth at pages 19 and 20 of Defendant's Scrap Book.

At or about the same time a special notice was sent out to doctors and physicians of the United States in nearly all of the large cities of the country, enclosing a pamphlet like the colored Hunyadi Matyas label circular, showing substantially the Hunyadi Matyas label. Such letter sent to physicians is shown at page 22 of Defendant's Scrap Book.

During the years 1890, 1891 and 1892 a large num-

ber of these notices were distributed to physicians and some ten thousand sample bottles of the Hunyadi Matyas water with the regular Hunyadi Matyas label on them were distributed to physicians.

Notices were also inserted in some 150 of the prominent papers of the United States in which the Eisner & Mendelson Company were at that time advertising, to the effect that they were entering on the business of selling Hunyadi Matyas water in the United States, and specimens of such notices are shown at pages 17 and 21 of the Defendant's Scrap Book. Mr. Eisner's testimony with regard to general advertising in trade periodicals and papers of the Hunyadi Matyas water as sold by the Eisner & Mendelson Company, is found at pages 505 to 516 of the Record, and specimens of such advertising and the periodicals in which they were inserted are verified by Mr. Lissner, in his testimony on the part of the defendant, at pages 745 to 751 of Record. Lists of periodicals and the issues of such periodicals and trade journals in which such notices were inserted and specimens of such advertisements are shown at pages 5, 6, 9, 10, 15, 16, 18 and 26 of Defendant's Scrap Book.

The Apollinaris 1892 Protest, and its Significance and Legal Effect.

The Eisner & Mendelson Company thus introduced and sold the Hunyadi Matyas water in the United States without objection, protest or interference on the part of the Apollinaris Company during the years 1890, 1891 and 1892, when in the spring of that year occurred the sole and only objection on the part of said Company to any of the acts of the defendant company.

This is referred to by Judge Shipman in his Circuit Court decision, as follows:

"The Apollinaris Company, during the continu-
"ance of its Saxlehner contract, did not object to
"the Eisner & Mendelson Company's operations

"or trade-marks, or representations, except in one "particular, which was changed at the former'r re- "quest."

The circumstances under which this protest occurred, and what was done by the Eisner & Mendelson Company in relation to it, are set forth at pages 553 to 556 of the Record, and the matter is explained in detail.

Mr. Eisner states that commencing with the year 1890, and running on through the years 1891 and 1892, the Eisner & Mendelson Company sent out special trade advertisements or mailing slips, specimens of which are found at page 24 of defendant's Scrap Book. These mailing slips show on one side a fac-smile in miniature of the Hunyadi Matyas label in colors, and on the reverse side a picture showing approximately the situation of the Hunyadi Janos, the Hunyadi Arpad and the Hunyadi Matyas springs, these being the principal Hunyadi waters at Buda Pest.

This reverse side of the mailing slip also shows a comparative analysis of the Hunyadi Janos, Hunyadi Matyas and Hunyadi Arpad springs, and it was this comparative analysis which led to the protest referred to.

The testimony shows that these mailing slips were sent broadcast to the trade throughout the country, and this widespread publicity attracted the attention of Isidor Haldenstein, who was the representative of the Apollinaris Company in the United States, and who, it is admitted, had full right and power to bind the Apollinaris Company by his actions.

In the early part of the year 1892, or about that time, he called at the office of the Eisner & Mendelson Company in New York City, and had an interview with Mr. Eisner. He had one of the mailing slips with him, and, while making no protest or objection to the front of the mailing slip, which showed an exact fac-simile in miniature and in colors of the Hunyadi Matyas label, objected to the comparative analysis on the reverse side, on the

ground that it was unfair to the Apollinaris Company. Mr. Eisner, on behalf of the Eisner & Mendelson Company, said that this should be corrected on the next mailing slips that were issued. This was accordingly done, and, while in these subsequent mailing slips the front side still showed the Hunyadi Matyas miniature label in colors the comparative analysis was eliminated from the reverse side and other matter placed thereon.

Mr. Haldenstein corroborates the testimony of Mr. Eisner with reference to this protest, at pages 541 and 542 of the Record.

It is to be observed, that Mr. Mendelson, in the year 1890, gave full notice to the Apollinaris Company in London, of the intention of the Eisner & Mendelson Company to enter into the Hunyadi Matyas bitter water business, and that for two years prior to this 1892 protest the said Company had been selling the Hunyadi Matyas water under the name "Hunyadi Matyas" and the red and blue label, without any objection or protest on the part of the Apollinaris Company.

We now find that in the year 1892, when the label in colors was circulated to this large extent among the trade, that the only objection made in connection with the circulation of such mailing slips was to the comparative analysis, which was then corrected by the Eisner & Mendelson Company in obedience to the protest.

We, therefore, submit that this protest under the circumstances, its correction by the Eisner & Mendelson Company, and the absence of any other objection or protest to the labels, bottles or capsules, or to the use of the words "Hunyadi Matyas," or to any of the other acts, operations or representations of the Eisner & Mendelson Company in regard to the Hunyadi Matyas water business, form an equitable estoppel on the complainant from now objecting to the use of the words "Hunyadi Matyas," or to the bottles, labels or capsules.

The brief of petitioner criticizes the interview of

Mr. Mendelson above detailed with the President of the Apollinaris Company, on the ground that Mr. Mendelson did not show at such interview the proposed Hunyadi Matyas label the Eisner & Mendelson Company intended to use. This 1892 protest, and the correction of the comparative analysis on the back of the mailing slip, is also important as doing away with any vagueness with regard to the label used by the Eisner & Mendelson Company, and the knowledge of such label and its use by the Apollinaris Company. For two years the Hunyadi Matyas water had been sold in active competition with Hunyadi Janos water, each bottle of said Hunyadi Matyas water having affixed the red and blue Hunyadi Matyas label. The mailing slip showed a colored fac-simile of such red and blue label, bearing on its face the words "Hunyadi Matyas" and the analysis of the water, and on its back, the comparative analysis of the Hunyadi Janos, Hunyadi Arpad and Hunyadi Matyas waters, and we find the Apollinaris Company making no objection whatever to the face of label as shown on the Hunyadi Matyas bottles, but only protesting against the comparative analysis shown on the back of the mailing slip. This was corrected by the Eisner & Mendelson Company, and no protest or objection to the use of the Hunyadi Matyas label was thereafter made by the Apollinaris Company.

The principal reason on which the petitioner appears to rely in alleging fraudulent conduct on the part of the Eisner & Mendelson Company, appears to be that such company changed the color of its label when it entered upon the sale of Hunyadi Matyas water in 1890, ceasing to use the red and *white* label under which it sold the Royal Hungarian bitter water in 1889, and using a red and blue label bearing the words "Hunyadi Matyas."

There is nothing in this change of label, having regard to the Hunyadi situation, both in Hungary and the United States, on which a charge of fraudu-

lent conduct can be founded. The German Royal Hungarian bitter water label, which the American Eisner & Mendelson 1889 label copied in all essential respects, is set forth at page 44 of defendant's scrap book. This label bears on its face the words "Hunyadi Mathias Quelle" as the alternative name of the water, and the evidence shows, as we have seen above, that both the name "Hunyadi" and the red and white and red and blue labels were not in 1890 the sole and exclusive property of Saxlehner, but were generic and common to the mineral water trade both in Hungary and the United States.

Corroborative evidence of this fact, as regards the label, is found in the affidavit of Joseph Ungar, filed on the motion to vacate the 1887 injunction, and on which, with the other papers in the case, the injunction was dissolved in 1888 in the Ungar suit. It is stated as follows in said affidavit (Record p. 581) with regard to the "Hunyadi Janos" labels:

"The form, color and design used in the labels "upon the battles containing the said 'Hunyadi "Janos' water are not used solely to designate the "said 'Hunyadi Janos' water, but are, and have "been for many years, used by the owners and "vendors of various bitter waters in Hungary, and "are recognized and understood by merchants "and consumers as designating the general nature "and quality of the waters coming from all the "bitter water springs of Hungary.

"The said form, color and general design have "been appropriated and used for labels by the "owners of many different Hungarian springs be- "sides the owner of the 'Hunyadi Janos' spring."

With regard to the bottles in which the Hunyadi Matyas water was put up, and their similarity to the Hunyadi Janos bottles, which is alleged as another cause of complaint and alleged badge of fraud, the same affidavit says, as follows, at p. 580 of Record:

"It is true that the bottles containing the 'Hun-"yadi Arpad' water, and those containing the "'Hunyadi Janos' water, are some what similar "in size and shape, and that the capsules upon the "said bottles are made of the same material, almost "all the bottles containing bitter waters coming from "Budapest are obtained at the same factory as "those used by the 'Hunyadi Janos' and 'Hun-"yadi Arpad.' Almost all of the bottles used for "these different bitter waters come from the same "factory, namely the factory owned by one Sie-"mans, and are, therefore, the same in the case of "all these waters.

"There are at least fifteen springs in Buda, Hungary, producing bitter waters, and all of them use for the export trade bottles of the same form, size and general appearance and capsules of the same material and appearance, only with a different stamp impressed thereon."

With reference to the various other alleged fraudulent acts of the Eisner & Mendelson Company, it is sufficient to say that the waters sold by them under their Mattoni & Wille contract could not have been bottled or furnished to them under their Hunyadi Matyas labels at that time, except under the direct authority and sanction of the proper Hungarian authorities.

Under the laws of Hungary no one had the right to sell any spring waters possessing medicinal qualities unless he had first registered the name of the said water in the office of the Royal Hungarian Minister of Agriculture, Industry and Commerce, and obtained a license from the said minister to use the name so registered. (Record, p. 578, 585, 592).

A review of the whole situation shows that in 1890 the Eisner & Mendelson Company entered into the business of selling Hunyadi Matyas water in the United States in good faith, on notice to the Apollinaris Company, and continued to sell it thereafter under the red-and-blue label without any interference, objection or protest (except in the par-

ticular above named) *on the part of the Apollinaris Company, the only person interested in or having the sole right to move in the matter.*

THE APOLLINARIS COMPANY'S ADMISSION IN THE SPRING OF 1893 THAT THE WORD "HUNYADI" IS A GENERIC TERM, AND THE RED DIAMOND MARK AND ITS SIGNIFICANCE.

In the spring of 1893 the Apollinaris Company pointed out and emphasized the fact that the word "Hunyadi" was then, and had become by custom and usage in the United States, to its knowledge, a generic term for Hunyadi or Hungarian bitter waters, by sending out postal cards all over the United States, and by advertising largely in the daily papers throughout the United States, that Hunyadi was a general or generic name for Hungarian bitter waters.

The evidence with regard to this is especially set forth in the testimony of Isidor Haldenstein from pages 534 to 537 of the Record, and the notice itself is printed at 612 and 613 of the Record. Specimens of such notices are also found at pages 37 and 38 of Defendant's Scrap Book. The most important part of this notice reads as follows:

"The word 'Hunyadi' having become a general "name for Hungarian bitter waters, good, bad or "indifferent, the Apollinaris Company affixed to "the bottles of Hunyadi Janos, the Hungarian "bitter water, of which they still have sole sale, a "small Yellow Label with their Red Diamond, the "object of this trade-mark being only to indicate to "the public that the bottle so labelled is sold by the "Apollinaris Company, Limited."

Both the Circuit and Appeal Courts refer to and comment upon this notice as one of the most important facts of the case. Thus the Circuit Court says with regard to it:

"Whatever may have induced the action of the "Apollinaris Company, it did, notwithstanding the "name had become localized here, abandon, in "terms and positively, a claim to a right to its ex- "clusive use and affirmed that it had become in "practice a general name. As the name had become "in fact a trade name in 1886, so, also, it could by "affirmation and positive action cease to be such, "and when it had publicly become open to use by "competitors the persons who invested their money, "in the honest belief that the name was public "property, should have a fair standing in a court "of equity." Record, page 626.

The Court of Appeals says with regard to the same notice:

"In 1889 and again in 1890 that company an- "nounced that it had adopted an additional trade- "mark of selection (a red diamond), which was to "distinguish the Hungarian Aperient Water sold "by it, and that it did so for the reason that "numerous Aperient waters are offered to the pub- "lic under names of which the word 'Hunyadi' "forms a part. In 1893 the Apollinaris Company "issued a further circular in which it stated that: "'The word Hunyadi having become a general "name for Hungarian bitter waters, good, bad and "indifferent, the Apolinaris Company has affixed "to the bottles of Hunyadi Janos water the red "diamond, &c., &c.'" Record, p. 659.

This act of the Apollinaris Company, based upon the fact that all these various Hunyadi waters were in the market at that time, and were selling under the red and blue labels, is most important as a formal acknowledgment to the public of the United States, advertised in the most thorough and complete way, not only at the time, but also, as Mr. Haldenstein testifies, during the year 1893 and the following years, that the Apollinaris Company, as the owner of the Hunyadi Janos business in the

United States and the direct representative of the complainant, had surrendered and abandoned all claim to the word "Hunyadi" and to the red-and-blue label as exclusively identifying the Hunyadi Janos water.

That by this, 1893 notice, the red-and-blue label was abandoned as well the name "Hunyadi," appears by the following statement in the said notice:

"Consumers who desire to secure the Hungarian "Bitter Water sold by the Apollinaris Company are "requested to see that the bottle bears the Red "Diamond."

This announcement practically said to the public: "There are a number of Hungarian bitter waters in "the market which bear the name 'Hunyadi', and "use a red-and-blue label similar to the Hunyadi "Janos label. The word 'Hunyadi' and the red-"and-blue label, therefore, no longer distinguish the "Hunyadi Janos water from the other waters. You "are, consequently, no longer, as you have hereto-"fore, to look for the word 'Hunyadi' and the red-"and-blue label on the Hunyadi Janos bottle as the "distinguishing marks; *but if you wish the real "Hunyadi Janos water, to see in every instance "that the bottles you buy, bear the Red Diamond "mark.*"

That this was the case is plainly shown by the adoption and previous use by the Apollinaris Company of the red diamond mark. The Company commenced to use this mark in or about the year 1887, and in 1888 when the injunctions were dissolved, it was in full and complete use by the Company, and was thereafter invariably used on all bottles of Hunyadi Janos water sold by said Company until the termination of the Apollinaris contract in 1896.

This red diamond mark was used by the Apollinaris Company to distinguish the Hunyadi Janos water from the Hunyadi Arpad, Hunyadi Laszlo, Hunyadi Bela and other Hungarian bitter waters thereafter coming into the market, which all used the word "Hunyadi" and the red-and-blue label.

This mark was meant to appeal to the sight, so that the public would know that the red-and-blue label was no longer the distinguishing mark by which the Hunyadi Janos water was to be recognized. In other words, the public was no longer to rely upon the word "Hunyadi" and the red-and-blue label as the distinguishing marks of the Hunyadi Janos water; but was to rely on the red diamond mark to distinguish such Hunyadi Janos water from the other Hungarian bitter waters, all of which used red-and-blue labels.

The announcements of April 6th, 1889, and of April, 1893, emphasize this intention, and show that the red diamond mark was not intended to distinguish the mere name "Hunyadi Janos" from the other Hunyadis in the Market, but was intended to be the mark by which the Hunyadi Janos red-and-blue label was to be distinguished from the other red-and-blue Hungarian bitter water labels.

THE FINDING OF THE COURT THAT THE USE OF THE EISNER & MENDELSON "SEAL BRAND" LABEL WAS NOT AN INFRINGEMENT AMPLY JUSTIFIED AND SUSTAINED BY THE EVIDENCE.

The Circuit Court says, with reference to this Seal Brand Label, as follows, at page 625 of the Record:

"In 1893 the Eisner & Mendelson Company began "to use, and has used ever since, upon their stand- "ard bottles of Matyas water an additional label "consisting of a red seal upon a white ground and "containing the words, 'Ask for the Seal Brand. "'This label has been adopted to protect the pub- "'lic from imitation, and as a guarantee of the "'genuineness of the Hunyadi Matyas Water "'imported solely by the Eisner & Mendelson Co., "'New York.' The attention of druggists has "been called to this seal brand by advertisements "in the trade papers."

The Court further says, at page 627 of the Record, as follows:

"The defendant has, however, since 1893, for the "purpose of having a mark of its own and thus avoid "the injurious effect of new competitiou, used a dis- "tinctive 'Seal Brand,' which is a red seal upon a "white ground, large enough and peculiar enough to "be easily recognized, and which informs the public, "in substance, that the water is Matyas Water and "is sold only by the defendant."

The Court finds that, as the defendant had the clear right to use the words "Hunyadi Matyas" to designate its water, this peculiar and distinctive seal-brand label identified the Hunyadi Matyas water with the Eisner & Mendelson Company, and distinguished it by its red-seal mark from all other Hunyadis in the market.

The evidence on which the Circuit Court bases these portions of its opinion is entirely undisputed, but we desire to call the attention of this Court in this connection to what happened in the year 1893 in regard to Hunyadi waters, which naturally led to the adoption and use of the seal-brand label by the defendant corporation.

On May 2d, 1892, the Eisner & Mendelson Company entered into the Ungar lease, under which it imported and sold the Hunyadi Arpad, Hunyadi Bela, Victoria and Rakoczy Gyorgy waters. By the terms of this contract, the Eisner & Mendelson Company was bound to sell yearly as many bottles of the Ungar waters as of Hunyadi Matyas water, and the whole spirit of the contract shows that it was the intention of the parties that during the term of the contract no change should be made in the conditions existing at its commencement, without the mutual consent of the parties. Therefore, during the year 1892, it was obviously impossible for the Eisner & Mendelson Company to make a substantial change in its label without violating the spirit of the agreement, and, besides this, there would have been no motive, as, no matter how

popular or how distinguished from other waters the Hunyadi Matyas water might have become by the adoption of a new label, its sales could not, in accordance with the Ungar contract, be made to exceed the sales of the Ungar waters.

But on July 6th, 1893, this condition of affairs was entirely changed by the buying up by the complainant of the Ungar springs and the consequent cancellation of the Ungar contract with the Eisner & Mendelson Company. The said Company was thereafter entirely free from the entanglements of the contract, and privileged to make any changes it pleased in the Hunyadi Matyas label.

In the spring of 1893, also the Apollinaris Company published and circulated broadcast, by means of postal cards addressed to the trade and physicians and all persons interested, and by advertisements in trade and even daily papers, the formal announcement that "Hunyadi" had become a generic name, and that the Hunyadi Janos label was to be distinguished from other Hunyadi waters by the red diamond mark.

After these occurrences in the year 1893, the Eisner & Mendelson Company took measures to protect the name "Hunyadi Matyas," and distinguish the Hunyadi Matyas water and its label from all other Hunyadi waters.

On August 22d, 1893, the Company obtained a United States trade mark (Record, page 613) for the name "Hunyadi Matyas," and about the same time adopted the seal brand label, which the Company has invariably used ever since on its standard bottle. (Record, p. 354.)

The seal adopted was a large red seal displayed on a white background, with the language quoted above from the opinion of the Court, identifying the Hunyadi Matyas water with the Eisner & Mendelson Company as its exclusive seller. This label was so placed as to partially obliterate one of the side panels of the red and blue label.

The undisputed evidence also shows that the

Eisner & Mendelson Company often after its adoption, advertised the seal brand label in the trade papers (Record, p. 355), and also by the circulation of mailing slips called attention to the seal brand as identifying the Hunyadi Matyas water. (Record, pp. 355–356.)

It is also testified at page 356 of the Record, that by the use of the seal brand label on the Hunyadi Matyas water, and by the publicity given to the name "Seal Brand," such name has to a large extent become an alternative name or designation for the Hunyadi Matyas water, the trade ordering it and calling it "Matyas Seal Brand," or simply "Seal Brand."

That the adoption and use of the seal brand label did perform its office of distinguishing the Hunyadi Matyas water from the other Hunyadi waters in the market, and identifying such water with the Eisner & Mendelson Company as seller, is shown indirectly by the fact that the table of importations of Hunyadi waters (set forth in the opinion of the Circuit Court at p. 625 of the Record), shows that the importation of the Hunyadi Matyas water by the Eisner & Mendelson Company was largely increased, over previous importations, in the years of 1894 and 1895.

In 1894 the importation amounted to over three hundred thousand bottles, and in 1895 to over two hundred and fifty thousand bottles. These importations were a very large increase over any previous importations, which facts show that the sale of the water was increased largely in popularity and extent of sale by the adoption of the seal brand label. The table only shows the importation of this water for a few months in the year 1896, from January to April, and, therefore, does not show the importation in full for that year.

In the year 1893, the Eisner & Mendelson Company exhibited its Hunyadi Matyas water at the Columbian Exposition, where such water obtained the Highest Award for excellence, and often adver-

tised this fact in connection with the seal brand label. (Record, p. 355.)

The Court is, therefore, amply justified in its conclusion that this seal brand label fully distinguished and differentiated the Eisner & Mendelson Hunyadi Matyas water from the other Hunyadi waters in the market.

The complainant had such knowledge that she must be deemed conversant with the acts of the Apollinaris Company and the situation as regards the sale of Hunyadi waters in the United States during the last eight years of the Apollinaris contract.

The petitioners' counsel strenuously assert in their brief that the main reason why the complainant was not bound by the acts of the Apollinaris Company with regard to the name "Hunyadi" and the label, was, that there was no proof of complainant's knowledge of such acts or of the alleged infringements which occurred during the term of the Apollinaris contract.

Under the finding of the Court of Appeals, this alleged want of knowledge is immaterial, as the Court holds that Saxlehner and the complainant were and are chargeable with such knowledge.

The Court well says in this regard: "Nor is the "situation changed by Saxlehner's absence abroad. "If he had chosen to sell his own goods in this "country, thus becoming the dealer here familiar "with the conditions of the business, he must inev- "itably have acquired the knowledge as to appro- "priation of the name and label, which the Apol- "linaris Company acquired, and if, with such "knowledge, he went on year after year without "even giving notice of dissent and non-acquies-

"cence, there would surely come some time when "he must be held to have abandoned his exclusive "claims. And he cannot avoid the imputation of "such knowledge, merely by selling his entire im- "portation to a single person, leaving to that per- "son the distribution of the goods to the trade here. "If he wished to hold on to his trade name and "trade label in this country he should either have "taken steps to advise himself as to the situation, "or should have seen to it that his selected vendee "who shared with him in his monopoly took proper "action to maintain his rights." (Record, page 596.)

As, however, the complainant's counsel has made the point that the complainant is not chargeable with the acts of the Apollinaris Company during the term of the contract, because she did not have any knowledge thereof, we propose to show that she had such knowledge that under the law she must be deemed conversant therewith, and, therefore, bound thereby.

The only person connected directly with the complainant, examined in this case on her part, was Kalman Saxlehner, her son, a young man, who at the time of testifying in 1897, was 29 years of age, and who, since the termination of the Apollinaris contract has been in charge of the New York branch of the Hunyadi Janos business.

He, indeed, testifies that he did not personally know of the situation regarding the sale of Hunyadi Janos waters in the United States, until he came to this country, in the year 1895. He explains this by stating that while his active participation with the firm of Andreas Saxlehner began in 1888, he was not initiated into the more important matters of the firm business until several years thereafter.

His statement with regard to this matter is found at pages 116 and 117 of the Record.

He states in answer to cross-examining questions on these pages, that for the reasons he gives, as above stated, he personally had no definite knowl-

edge of the situation of Hunyadi matters in the United States until 1895, but he says frankly that he speaks only for himself, and will not swear that the firm of Andreas Saxlehner did not have such knowledge of the situation of Hunyadi matters in this country. On the contrary, he states that so far as relates to the sale of Hunyadi Matyas Water, the complainant may have had such knowledge, for when asked in x-Q. 134 (p. 115) whether or not the firm of Andreas Saxlehner knew of the sale of Hunyadi Matyas water in the United States, he says as follows:

"I don't know; MAYBE THEY KNEW."

This was the testimony as to complainant's knowledge of Hunyadi matters in the United States, given in *prima facie* case.

In defense, in regard to complainant's said knowledge, the following facts were shown by undisputed evidence:

1st. It was shown that the firm of Mattoni & Wille, with which firm the Eisner & Mendelson Company made their 1890 lease, were rival and bitter competitors of the complainant in the sale of Hungarian bitter waters, and were the owners of the Hunyadi Matyas springs, which were situated in Buda Pest, at a comparatively short distance from the Hunyadi Janos springs, and had their establishment and conducted their business of bottling and preparing such waters for shipment in the same city.

It is also in evidence, testified to by Mr. Eisner, at page 395 of the Record, that the bottles of Hunyadi Matyas water sold under the 1890 lease were labeled at Buda Pest, and continued to be so labeled during the term of the Apollinaris contract, such labeling at Buda Pest being only discontinued about a year before he testified, or in the fall of 1896.

It is impossible, therefore, to believe, in the face of these facts, that the complainant did not know of the sale of the Hunyadi Matyas water by the

Eisner & Mendelson Company, and of the label used by them during the term of the Apollinaris contract.

2d. But the most important fact which brings directly home to the complainant, her knowledge of the sale of Hunyadi Arpad, Hunyadi Matyas and Hunyadi Laszlo waters in the United States, is her buying up the Hunyadi Arpad and Hunyadi Bela springs in the summer of 1893.

At this time the Eisner & Mendelson Co. were selling the Hunyadi Arpad and Hunyadi Bela waters under their red and blue labels, under an arrangement with Ungar, the owner of said springs, by which said company had been made the sole and exclusive seller of the same in the United States. They were also selling the Hunyadi Laszlo water by a like arrangement with its owner, and were selling the Hunyadi Matyas water under the 1890 lease, and had advertised such waters and themselves as exclusive sellers thereof in trade papers and in other ways.

On July 6th, 1893, the Hunyadi Arpad and Hunyadi Bela springs were bought by the complainant of Ungar, their owner, the springs closed, and the importation of these waters to the United States, to be here sold by the Eisner & Mendelson Company, stopped. (Record, pp. 333, 334.)

It was further shown that the price paid by complainant was two hundred and twenty-five thousand florins (Fl. 225,000), or seventy-five thousand dollars ($75,000), ten thousand dollars of which, or its equal in value, being received by the Eisner & Mendelson Company for its contract. (Record, p. 333.)

This fact was so important and significant, as showing that the complainant must have had knowledge at the time of the Hunyadi situation in the United States, that the complainant's counsel, in their brief at final hearing, were obliged to take notice of the fact and endeavor to diminish its force. This is what they said on this subject in their brief at final hearing:

"The purchase by complainant of Ungar's 'Vic-"toria' and 'Hunyadi Arpad' springs in 1893, un-"doubtedly acquainted the complainant with the "fact that the Eisner & Mendelson Company had an "agency for those waters in the United States, but "is not proof that complainant knew under what "labels defendant was selling these waters here."

The statement in this quotation that the complainant did not know under what labels defendant was selling these waters, is very lame, in view of the admission that she knew that the Eisner & Mendelson Company was the agent, and, therefore, must have known that it was the seller of the Hunyadi Arpad water, and in view of the facts that the Ungar springs were situated in Buda Pest within the city limits and at a short distance from the Hunyadi Janos springs, and that Ungar bottled his waters for export and prepared then for shipment to the United States in the same condition in which they were sold here.

Here, again, it is incredible to believe that the complainant did not know what the Hunyadi Arpad United States label was, and in view of the fact, that she knew that the Eisner & Mendelson Company was the selling agent of such water, that she did not also know that it was also the seller of the Hunyadi Matyas water, the Hunyadi Laszlo and Hunyadi Bela water, of which said Company was agent at the time.

The undisputed evidence as above set forth shows a state of facts which renders it positive that the complainant must be deemed conversant with the situation regarding the sale of Hunyadi waters in the United States, and the acts of the Apollinaris Company with reference to the name "Hunyadi" and the red and blue labels, from in or about the year 1890.

3d. One thing is certain, and that is, that after such a presentation of facts as made by the defendant, the burden of proof was thrown on the complainant to

show in rebuttal that the firm of Andreas Saxlehner did not have such knowledge.

No attempt, however, was made to refute the facts shown by the evidence in defense or to show such want of knowledge.

The only witness connected with the complainant produced in rebuttal was Kalman Saxlehner, who was recalled to testify as to various facts. But in his testimony he makes no attempt to explain the facts proving such knowledge produced by the defendant in its defense.

On the contrary, on cross-examination, he states a fact which tends strongly to prove that the complainant must have been, prior to the year 1891, thoroughly familiar with Hunyadi matters in the United States.

Saxlehner is asked at page 215 of the Record, where the red-and-blue label used by the Apollinaris Company during its contract was put on, and states that the red-and-blue labels were put on at Buda Pest.

He is then asked by whom the red diamond label was put on, and states that it was put on by the Apollinaris Company against the wish of the firm of Andreas Saxlehner, and that in 1891 the firm tried to make a motion in England against it.

This motion was either not attempted, or, if attempted, unsuccessful, because it is not referred to by Saxlehner again.

But the significance of this piece of evidence is that it shows that the complainant in the year 1891 and prior thereto, was thoroughly familiar with the fact that the Apollinaris Company used the red diamond mark on the red-and-blue Hunyadi Janos label.

It is, therefore, impossible to believe that the complainant, knowing all about the use of the red diamond mark, was not also familiar with the circumstances in the United States which made its use by the Apollinaris Company necessary, in order

to distinguish the Hunyadi Janos water from the other Hunyadi waters using the red-and-blue label.

From the above circumstances, we contend that if knowledge on the part of the complainant of the sale of Hunyadi Matyas water during the term of the Apollinaris contract, and the acts of the Apollinaris Company with reference to that and the other Hunyadi waters is material to the issues of this case, such a state of facts has been shown by the evidence, as must have necessarily and inevitably led the complainant to a knowledge of all the material actions on the part of the Apollinaris Company, on which the defendant relies in its defense, and that, therefore, for this reason, the abandonment, neglect and laches of such company with regard to the Hunyadi Matyas and other waters, must bind the complainant.

The above facts are ample to bring this case within the doctrine announced by this Court in the case of *Johnson* vs. *Standard Mining Co.*, 149 U. S., pp. 360–370, to the effect that where a question of laches is involved, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence.

In this case, the Court refers to the previous case of *Foster* vs. *Mansfield*, 146 U. S., 88, where the same principle was applied. The same principle was also substantially applied in the subsequent case of *Hardt* vs. *Heidmeyer*, 152 U. S., 547, 558.

The 1888 Saxlehner Letters.

On page 22 of Petitioner's brief appears a portion of a copy letter written by the Apollinaris Company to Andreas Saxlehner. This letter is dated June 26, 1888, and is in full as follows:

"We think it only courteous, in spite of your "refusal to assist in the proceedings in our action "against the Agent of Ignatz Ungar in New York "(this had reference to the Hunyadi Arpad water), "to inform you that on Saturday last we for the "first time heard by telegram from New York "that a motion would be made on the 2d day of "July next by the said Agent to dissolve the in- "junction granted in 1886, restraining him from "using Ungar's Hunyadi Arpad label. The recently "published decision of the Hungarian Minister of "Commerce given against you in your case *v.* Hun- "yadi Joseph confirms us in the opinion which we "had formed more than a year ago, and mentioned "to you in our letter of the 8th of March, 1887, "that we cannot hope to succeed in preventing the "sale of other waters in America under names of "which Hunyadi forms apart. We do not, there- "fore, intend to oppose the dissolution of the "injunction."

Another copy letter from said Company to Saxlehner, dated January 24, 1888, is also set forth at page 604 of the record, in which Saxlehner is asked to aid and assist the Apollinaris Company in prosecuting infringers. The letter was so framed, that if Saxlehner did not answer it, the Apollinaris Company were to understand that Saxlehner refused to so aid. No answer was returned to this first letter, and then, in June, the Apollinaris Company wrote the second letter set forth above.

The copies of these letters were ruled out by the Circuit Court as hearsay testimony. The Court of Appeals did not pass specifically on the point. The

Defendant-Appellant in its appeal, made the exclusion of these copy letters as proper secondary evidence, the subject matter of its eighth assignment of error (Record, p. 641), and therefore is at liberty to bring the matter before this Court. The matter came up in this way.

Isidor Haldenstein was the direct representative of the Apollinaris Company in this country, first between the years 1883 and 1889, with Frederick de Bary & Company, the Agents of the Apollinaris Company in the United States, and thereafter with Charles Graef & Company, commencing in 1889, until the terminatien of the contract with the Apollinaris Company in 1896.

He was produced as a witness by the defendant, and it appears from his testimony, that after the termination of the Apollinaris contract in 1896, Emilie Saxlehner, in the spring of 1897, brought suit against Charles DeGraef & Co., the agents of the Apollinaris contract, for using the Red Diamond mark on bottles of a water called "Apenta," and applied for a preliminary injunction. The suit was brought upon the theory that the use of the Red Diamond mark on the bottles of "Hunyadi Janos" water during the Apollinaris contract, and for the period of some nine years, so identified and associated the mark with the "Hunyadi Janos" label that its use on the Hungarian bitter water "Apenta" label was unfair, especially by reason of the fiduciary relations of the Company as agent for Saxlehner during the period of the contract (Record, p. 526).

It further appears that the copies of the letters above referred to were introduced in evidence on part of said defendants on the injunction motion in the affidavit of Julius Charles Prince (Record, p. 531). The motion was heard by Judge Lacombe, and denied by him, and the authenticity of these copies and their correctness was not denied by the complainant, Emilie Saxlehner, who is also the complainant in this present suit, or on her behalf. In-

quiry was made for the original letters of Kalman Saxlehner on *prima facie* case, and he was asked what had become of them, and to make search for them, and was informed on the record that the sole purpose of this portion of the cross-examination was to notify the firm of Saxlehner to produce such letters, so that, if not produced, secondary evidence of their contents might be introduced (Record, pp. 119, 120). Before producing Mr. Haldenstein as a witness, defendant's counsel gave formal notice to complainant's counsel to produce the said original letters, and informed him that unless produced, secondary evidence would be introduced of their contents (Record, p. 524).

The original letters not being produced on the examination of Mr. Haldenstein, his attention was called to these copy letters, and he said he knew of them from correspondence of the Apollinaris Company and from the Prince affidavit used in the injunction motion. (Record, pp. 530, 531.) After further examining him with reference to the matter, a certified copy of the Prince affidavit containing these copy letters (the original affidavit being on file in the Court) was produced, and offered in evidence for the sole and only purpose of producing these copy letters as secondary evidence (Record, p. 531). We, therefore, claim that the complainant, having been notified to produce the originals of these letters, and having had the fullest and fairest opportunity to produce, and failing to do so, the copies of these letters in the Prince affidavit were proper secondary evidence. It is also to be observed that these copy letters had been already used in judicial proceedings brought by the same complainant, and the correctness of the copies had not been questioned, or if objected to, the objection was overruled by the Court, as the Court denied the injunction motion, and in so doing, says, on the authority of these letters, that Saxlehner refused to aid or assist the Apollinaris Company in 1888 in the matter.

We, therefore, ask the Court to consider these

copy letters, as their importance is obvious, because they at once do away with all pretence on the part of petitioner's counsel, that Saxlehner did not know and was not informed of the proposed abandonment of the 1888 Ungar litigation.

Testimony of the Trade that the word "Hunyadi" has been a Generic Word, and the Red and Blue Labels used in Connection with such word, Common to the Trade During the Last Eight or Ten Years.

That the word "Hunyadi" in the United States since about the year 1888, when the Andres and Ungar suits were discontinued, and the exclusive right to the said word, and to the red and blue label, abandoned by the Apollinaris Company, as the representative of Saxlehner, had become generic, and the red and blue label common property, appears by the following testimony:

Paul Scherer testified with regard to the history of Hunyadi Arpad and other Hunyadi waters, from page 425 to page 436 of the Record.

He says that as soon as the injunction was vacated in the Ungar suit he became the agent for the sale of Hunyadi Arpad water for the City of New York, under Perrine & Co., the General Agents of Ungar in the United States.

He testifies that this Hunyadi Arpad water was sold in bottles with capsules and labels as shown substantially on Defendant's Exhibit Hunyadi Arpad Bottle, and that he continued to so sell the said water as Agent for Ungar in 1892, when he was succeeded by the Eisner & Mendelson Company, as hereinafter referred to.

Scherer also sold during the same period, as Agent for Ungar, the Hunyadi Bela water, and two

other Hungarian bitter waters called "Victoria" and "Rackoszy Gyorgy," of which springs in Hungary, Ungar was the owner.

During the same period from 1888 to 1892, and thereafter, he also sold as a general mineral water dealer, another mineral water called "Hunyadi Laszlo."

The labels under which these waters were sold are shown at pages 30, 50 and 52 of Defendant's Scrap Book.

After giving this testimony he states (Record, 441) that the various Hunyadi waters he sold or knew of were called either "Hunyadi" or "Hungarian" bitter waters, the said names being alternate names for the various Hunyadi waters he has referred to and spoken of in his testimony, and that from his wide experience from the year 1888 up to the time he is testifying, as a mineral water dealer, both at wholesale and retail, he can state that the word "Hunyadi" has during that period been a term used to designate "Hungarian" bitter waters.

Scherer's testimony is valuable, owing to the fact that he has been constantly in the mineral water business in the United States since 1873, and his experience in regard thereto, especially as agent for the Hunyadi Arpad and Hunyadi Bela from 1888 to 1892, and his acquaintance since with the various Hunyadi waters in the market, which he has been known as a dealer both at wholesale and retail.

Mr. Isidor Haldenstein has been referred to in this brief as the man who since 1883 had charge of the Hunyadi Janos business in the United States as the direct representative of the Apollinaris Company in this country, up to the time of the termination of the Apollinaris contract in 1896. Mr. Haldenstein, as the testimony shows, was, when he testified, the agent for the Apenta water, a rival and competitor of the Hunyadi Matyas and Hunyadi Janos water in this market. He is, therefore, of course, a hostile witness, and his testimony is valuable as coming from an unfriendly

source. He states, at page 537, that in the period between 1888 and 1897 he has known of ten or eleven Hunyadi waters being sold in the United States, the names of which he gives as follows: Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos, Hunyadi Alajos, Hunyadi Vilmos, Hunyadi Bela, Hunyadi Miklos and Hunyadi Joseph. He then, from page 802 to 804, identifies the labels under which the various waters were sold during this period. It further appears that Mr. Haldenstein, in his affidavit on the motion for preliminary injunction in the suit of *Saxlehner against Graef*, brought in the spring of 1897, testified as to the importation of the various Hunyadi waters during the period from 1886 to 1897.

He is asked about this importation and testified in relation thereto from pages 537 to 541 of Record. He gives the importation of each individual Hunyadi water during this period, and states that he carefully compiled the data from the best sources of information at hand, such sources being the "Journal of Commerce" and "Bonfort's Journal," which are the recognized authorities on importations.

A tabulated statement of these importations is given in the opinion of the Circuit Court, at page 625 of the Record.

After giving these data, Mr. Haldenstein is asked what he and the mineral water trade from 1888 or 1889 understood the word "Hunyadi" to mean as applied to mineral waters, and states, substantially, that the trade understood it to mean an aperient water coming from the neighborhood of Buda Pest. He further says that during this period the different Hunyadi waters were distinguished by the dealers selling them by the word "Hunyadi" with the suffix or second name "Arpad," "Matyas," Janos," "Bela," etc. (Record, p 541.)

The testimony of Mr. Scherer, Mr. Haldenstein, and Mr. Eisner, which we have heretofore given,

with reference to the history of Hunyadi waters in the United States, and the meaning of the word "Hunyadi" and the facts relating thereto, are, from the acquaintance of these gentlemen with the facts of the trade and their experience as detailed in their evidence, the best source of information obtainable.

But the defendant, in presenting its case, was not satisfied with this evidence alone, but proceeded to verify and corroborate it by the testimony of the general trade, both retail and wholesale, of a high character.

THAD. D. WILSON, whose direct evidence is given from pages 466 to 468 of record, states that he has been employed for the last fourteen years by the firm of Lehn & Fink, of New York City, which firm are wholesale dealers in drugs and large dealers in mineral waters; that said firm is well known throughout the country, and does a large business, employing twenty-two salesmen; that he has known the Hunyadi Matyas, Hunyadi Arpad, Hunyadi Janos, Hunyadi Bela, Hunyadi Laszlo and Hunyadi Lajos waters for the last eight years, and has bought them all with the exception of the Hunyadi Bela water; that said waters have been known generally by the trade during the last eight years as "Hunyadi" waters, and specifically as "Hunyadi Janos," "Hunyadi Matyas," "Hunyadi Arpad," etc., and that the said firm of Lehn & Fink sold such waters by such distinctive names.

ALFRED H. KENNEDY, whose testimony is given from pages 477 to 482 of record, states that he has been connected with the Charles N. Crittenton Company and its predecessor for over thirty years; that the said Crittenton Company is the largest dealer in proprietary medicines in the country, and a large dealer in mineral waters, and that he has known during the last eight years, some seven or eight Hunyadi waters in the market, and has dealt in the

same, and that such Hunyadi waters all had the threefold division label with red centre and two blue wings. He further states that when an order was given by a customer, the said Crittenton Company asked the person so ordering to specify what "Hunyadi" he wanted, and that they gave him the kind of Hunyadi water specified, and that during this period all these mineral waters have been classed as "Hunyadi" waters, and distinguished from each other by their specific names, "Matyas," "Arpad," "Janos," etc., and that the trade generally understood by the term "Hunyadi" a class of waters coming from Buda Pest, the full names designating the particular springs.

CHARLES O. WEISZ testifies, from pages 488 to 492, that he has been connected with the well known firm of McKesson & Robbins for the last twenty-seven years, and that such firm during the last ten years has dealt in "Hunyadi" mineral waters, the Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Lajos and Hunyadi Bela, and that these waters are distinguished from each other by said specific names, and that McKesson & Robbins have had such waters on their price lists and catalogues during that period.

The testimony of Mr. Wilson, Mr. Kennedy and Mr. Weisz is very valuable as showing what the wholesale mineral water dealers have understood by the term "Hunyadi," and that such Hunyadi waters have been sold freely by all these firms, distinguished from each other by their specific names, and that they have been listed in their catalogues and price lists under the generic name "Hunyadi."

The defendant also produced a number of retail druggists, who speak for the retail drug trade in regard to the sale of Hunyadi waters in the market during the last eight years.

WILLIAM J. QUENCER, who testifies from pages 458 to 466, states that he has been engaged for the last

eight years at the pharmacy at 400 West Fifty-seventh street, corner Ninth avenue, in the City of New York, and during that time has sold Hunyadi Arpad, Hunyadi Lajos, Hunyadi Janos and Hunyadi Matyas waters. He identifies the bottles, labels and capsules in which these waters have been sold by him, respectively. He states that it has been his habit during the last eight years, when a customer calls at the store and asks for Hunyadi water, to ask him which Hunyadi he wishes, and then to give him his choice out of the Hunyadi waters he is handling at the time, and that his custom has been the same when inquiry has been made for Hungarian bitter waters; that he has understood during this period that the word "Hunyadi" means a general class of waters, to which the "Hunyadi Janos," "Hunyadi Matyas," "Hunyadi Arpad" and "Hunyadi Lajos" waters belong, and that the different springs are distinguished from each other by their second names.

His cross-examination only confirms what he has testified to on direct examination, that the word "Hunyadi" during the last eight years has been, in the retail drug trade, a generic term for Hungarian bitter waters generally, which have been distinguished from each other by the suffix or second name "Janos," "Matyas" and "Lajos."

At page 466, he states that at no time since 1889 has he connected the name "Hunyadi" with "Hunyadi Janos" water more than with any other bitter water.

SHERMAN F. HENNESSEY testifies that he has been for the last year and a half connected with the pharmacy at the corner of Broadway and Barclay streets, and that he was previously with the Hudnuts for three years, and previous to that time with various other druggists, the whole embracing a period of seven years.

He states that during these seven years he has known Hunyadi Janos, Hunyadi Arpad, Hunyadi

Lajos and Hunyadi Matyas waters, and if a customer asked for "Hunyadi" water he would ask him which kind of "Hunyadi" water he wished, and if he specified, he would get the specific kind of Hunyadi water he asked for; that, if the customer was not particular or did not care to specify, that he (Hennessey) would exercise his own judgment and give him any Hungarian bitter water that he had in stock; that during this period he has also known that these various Hunyadi waters were all classed under the general term "Hunyadi" and distinguished from each other by their second names. (Record, pp. 419-471.)

GEORGE H. BANCROFT'S testimony as a retail druggist is especially valuable, because for the last twelve years he has been connected with Hudnut's well-known Pharmacy. He testifies from pages 472 to 477 of Record that he has known during that period Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Lajos and Hunyadi Laszlo waters, all designating a general class of waters, distinguished from each other by their second names. On cross examination, he says that his customers call for "Hunyadi" in different ways, sometimes for "Hunyadi" water, and sometimes specifying the particular name, and that there is a reason for this distinction by customers of the various Hunyadi waters by their specific names, and this is because of the different prices; that some people are educated, he thinks, to buy a lower-priced water (p 474).

ADOLPH E. GEBHARD testifies from pages 492 to 495 of Record. He states that he is now engaged in business as a druggist at 361 Eighth Avenue, and has been in the drug business about thirteen years in the City of New York, and has sold and dealt in for the last eight years the various Hunyadi waters on the market, and he has always understood by the word "Hunyadi," as applied to these waters,

that they are waters supposed to be imported from Hungary, Buda Pest, and that the words "Matyas," "Janos," "Arpad," "Laszlo," etc., indicated the particular springs.

DOMINICK A. GREAVEN testifies from pages 511 to 513. He states that he has been connected with the well-known Perry's Pharmacy, now in the "World" building, and prior to that in the "Sun" building, and during the last eight years has dealt in Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas and Hunyadi Laszlo water; that it has been the custom in that store during that period if a customer ask for a specific Hunyadi water to give it to him, and if he declines to specify to give him any Hunyadi water the pharmacy had in stock.

GUSTAVE STRASSBURGER testifies, on the part of the defendant, from pages 513 to 522. He states that he was first employed by the P. Scherer Company; that about the year 1890 he entered the employ of the Eisner & Mendelson Company as salesman, and, commencing in the year 1892, he sold to about all the large trade east of Chicago all the various mineral waters that the Eisner & Mendelson Company dealth in, and the Hunyadi waters; that during the course of this employment he should estimate that he had visited at least thirty thousand grocers and druggists, including all the wholesale and retail grocery and drug stores in that section of the country he so traveled over, and has sold such trade the Hunyadi Arpad, Hunyadi Matyas, Hunyadi Janos, Hunyadi Bela and Hunyadi Laszlo waters; that he has also known of the Hunyadi Lajos and Hunyadi Vilmos waters, and that the various Hunyadi waters that he sold were distinguished from each other by their specific names, and that he sold them by their specific names, and that they were so distinguished in the trade he sold to.

The above testimony of both the wholesale and retail mineral water trade makes it clear that the

trade has understood for the last eight years that no one person was entitled to the exclusive use of the word "Hunyadi," and that neither the buyers or sellers have known any water by the single word "Hunyadi," and that in writing and speaking the trade has distinguished one Hunyadi from another by emphasizing the word "Janos," "Matyas," "Arpad," "Laszlo" or "Bela," with which the generic word "Hunyadi" is associated.

The complainant produces neither in *prima facie* case nor in rebuttal any testimony of importance tending to refute or impair the strength of the above trade testimony introduced by the defense.

In the *prima facie* case, John R. Agnew, as the representative of Park & Tilford, and William B. Higbee, as the representative of Acker, Merrill & Condit, testify that these firms have sold for many years Hunyadi Janos water, and that they have known such water as Hunyadi water. It is apparent that this testimony does not show that during the last eight years other Hunyadi bitter waters have not been on the market. Indeed, as regards the firm of Acker, Merrill & Condit, Mr. Eisner, in defense, produced three orders from that firm for Hunyadi Matyas water (Record, page 358). These orders are dated in 1896 and 1897, and are shown at page 70 of Defendant's Scrap Book.

In rebuttal, the complainant produced the evidence of Henry A. Cassebeer, Oscar Krause and Abram P. Kerley, retail druggists in the City of New York, who say that they have sold Hunyadi Janos water, and such water had been commonly demanded as Hunyadi water, Hunyadi Janos water or Hungarian bitter water, but the testimony of these witnesses is deprived of all force by their admissions that they have either sold or known of other Hunyadis in the market during this time.

Thus Cassebeer testifies as to the sale of Hunyadi Arpad water (Page 175 of Record); on cross-examination at page 176, he states that he has had Hunyadi Matyas water in stock for some years back, and may have had calls for it.

Krause testifies on cross-examination (Record, pages 178 and 179) that he has known of the Hunyadi Arpad and Hunyadi Matyas waters on the market for the last ten years, but that he has only sold and dealt in Hunyadi Janos water. He further admits that he has seen advertisements or statements in the papers of the Apollinaris Company stating that they put the diamond brand label on, of which Diamond Brand he speaks throughout his direct testimony, to distinguish Hunyadi Janos water from the other Hunyadis in the market.

Kerley testifies on direct examination, page 183, that while the Hunyadi Arpad has gone out, he orders the Hunyadi Matyas by the quarter or half dozen.

On cross examination, page 184, he testifies that he orders Hunyadi Matyas because people demand it under the name of Hunyadi Matyas, and he sells it by that name, and that during the last ten years he has known several Hunyadi waters, of which he has handled the Hunyadi Arpad, Hunyadi Matyas, the Hunyadi Janos and the Hunyadi Apenta, and that the Hunyadi Arpad, Hunyadi Matyas and Hunyadi Janos are distinguished from each other by their second names.

It is thus apparent that the complainant has produced no trade testimony to refute the overwhelming testimony of the trade produced by the defendant in defense.

The complainant endeavors to make up for this this lack of trade testimony, by producing the evidence of a number of physicians, who testify substantially that they have known Hunyadi Janos for years and have prescribed it for patients as Hunyadi water. A careful reading of their testimony makes it clear that they have generally prescribed it only in an informal way, by telling the patient to get a bottle of Hunyadi water. The fact that they supposed that the patient on going to a drug store and asking for Hunyadi water would, during the last ten years, be sure to get Hunyadi Janos water,

simply shows their ignorance of what has been going on in the mineral water and drug trade, and of the true situation. A large number of these physicians, especially those who testified in *prima facie* case, are young practitioners, some of whom are yet at Bellevue Hospital, and a number of the others on cross-examination either show their ignorance, by stating positively that they never heard or knew of any other Hungarian bitter water, or that they may have seen advertisements of Hunyadi Matyas water or may not, but that they paid no attention to advertisements, and so have not borne the matter in mind.

It is clear that the mere supposition of these physicians that their patients on going to a drug store in the city of New York and asking for Hunyadi water would always be sure to get Hunyadi Janos water, because they supposed that was the only Hunyadi water in the market, is not material to refute the true fact of the situation for the last ten years, which has been shown by defendant's testimony to be that some ten or eleven Hunyadis have been known in the market during this period, all of which have been sold freely and all of which have been known by the generic name "Hunyadi," and distinguished from each other by their suffixes or second names.

We have also a piece of evidence in this case, showing that in the month of September, 1896, the Saxlehner firm was fully aware that if physicians prescribed "Hunyadi" they would not get from the drug stores, "Hunyadi Janos."

So well did they know this, that in the Medical Record of September 5th, 1896, they advertised as follows:

"*Observe that the words Hunyadi Janos are in-*
"*separable, and must go together (Bonfort, 10*
"*July, 1896); when prescribing, kindly write the*
"*full name, Hunyadi Janos.*" (Record, p. 609.)

The Austro-Hungary Treaty Matter.

The petitioner's counsel claim substantially that the treaty provides that the reproduction of a trade-mark forbidden in Austro-Hungary is forbidden in the United States; that the use of the word "Hunyadi" as a trade-mark by others than the complainant was not forbidden until 1896, and that until that time, the fact that it was not so forbidden in Austro-Hungary constituted a serious obstacle to suits against its use in this country, but that the moment that its use was forbidden in Hungary in 1896, the provision of the treaty applied, and its use became unlawful here, and that in a suit brought on such trade-mark in the United States thereafter, the defendant could not set up the defense of loss and surrender of rights by acquiescence during the intervening nine years.

This contention is completely disposed of by the Court of Appeals in its denial of the motion for a re-argument.

In addition to the reasons there given, there are other considerations which deprive the petitioner's contention of all force. There never was a moment when the existence of the treaty interposed the slightest obstacle to a suit in this country to enforce the trade-mark derived from *use* in the United States. The precise bill filed in this suit might have been filed against any person using the name or label ever since their introduction into this country through the Apollinaris Company in 1876. The registration of the word "Hunyadi" as a United States trade-mark in the year 1887 is stated in the bill of complaint, but the suit is not brought upon the registered trade-mark, nor to enforce a statutory remedy. It is brought to enforce an alleged common law right, pure and simple, and to prevent unfair competition. The treaty, therefore, has no application.

Moreover, it is not possible to construe such treaty to mean that our Courts could abridge the

rights of American citizens to set up the defense of loss of rights by acquiescence on part of complainant because of any decisions given or laws passed in a foreign country. The treaty only gives to a citizen to Austro-Hungary the right to sue to restrain the infringement of a trade mark here, "just as if the plaintiff were a citizen of this country." It does not give the Austro-Hungarian a right which a citizen of this country does *not* possess, or relieve him from the effect of acquiescence, which, under our laws, would be fatal to his claim.

But there is another fatal objection to the enforcement of any alleged rights under the treaty. The treaty provides that if "*the trade-mark has be-*" *come public property in the country of its origin,* "*it shall be equally free to all in the countries or* "*territories of the other of the two contracting* "*parties.*"

For some fourteen years prior to the year 1887, the evidence shows that the word "Hunyadi" had been used in Hungary, under the sanction of its laws, as a general name to designate springs of Hungarian bitter water belonging to other persons than the owner of the Hunyadi Janos Springs.

We contend, therefore, that if the treaty is to be considered at all, the above facts are fatal to its application in this suit.

The Austro-Hungarian Decrees.

It is evident that this suit against the Eisner & Mendelson Company would never have been brought except for two coincidences:

First—That the Apollinaris Company terminated its contract with the complainant in the spring of 1896 instead of waiting until 1901, when the contract formally terminated, and,

Second—The fact that on October 7th, 1896, the complainant obtained these Hungarian decrees.

These decrees were a complete reversal of the policy which the Hungarian Government had pursued for the previous twenty years, during which time it had allowed the names, so decreed to be unlawful, to be used as designations of the respective springs, and by permitting their registration under the existing Hungarian trade-mark statutes, had legalized and sanctioned their use.

All these so-called decrees are, therefore, in the nature of *ex post facto* laws and are to be regarded in the light of mere edicts of a particular Minister, based upon the intricate regulations and rules of Hungarian trade-mark law, which cannot be made to apply in any way to the common law of this country.

In addition to this, it is to be observed, that on petitioner's own statement, as early as 1894, the Minister of Commerce had forbidden the use by his decree, of the pictorial trade-mark Hunyadi Matyas in connection with its label, whether printed in red and blue or red and white colors. The petitioner could, therefore, have at once brought suit in the United States, for unfair competition, against the use of the Hunyadi Matyas label bearing the words Hunyadi Matyas on its front, and brought in evidence the fact that such label and the use of the word Hunyadi Matyas in connection therewith was forbidden in Hungary, but not only did the petitioner fail to bring suit, but also failed to act in any way in 1894, and waited until after the new law of 1895, in relation to word trade-marks had been passed, under which the entire group of Hunyadi springs was allowed registration, and further delayed any action in the United States until after the edict of the Minister had struck the word trade-marks Hunyadi Matyas, etc., from the registry.

The petitioner can give no valid excuse for this continued delay to take action in the United States during this period running three years, from some time in the year 1894 until the spring of 1897.

It is, however, wholly immaterial that by an ex

post facto law, or ministerial decree, Saxlehner was allowed a trade-mark in *Hungary* which had been for twenty years public property in that country.

Our courts cannot enforce the laws of a foreign country—least of all can they even recognize them where they are repugnant to the very fundamental principles of our jurisprudence. To assume for a moment, that our courts would revive an extinct trade-mark in this country because such extinct trade-mark had been revived in Hungary, is too manifestly unreasonable to require serious discussion.

For the above reasons, the introduction of the Hungarian decrees in evidence and testimony relating to them was duly objected to by the defendant's counsel as immaterial and irrelevant to the issues in this case, and such decrees were not considered by the Courts below as important factors in reaching their conclusions.

Renewal of the Hunyadi Matyas Lease.

It is to be noted that the Hunyadi Matyas 1890 lease under which the Eisner & Mendelson Company had imported and sold the water, was to run for five years from the Spring of 1890, with the privilege of an extension of twenty years longer, if the Eisner & Mendelson Company gave notice of its desire to so prolong the lease, on or before the 1st day of March, 1895.

On August 31st, 1894, the Eisner & Mendelson Company gave such notice (Record, page 555), and in consequence the lease was renewed for twenty years from March 1st, 1895.

During the five years of the original term of this lease, the Eisner & Mendelson Company had entered into the business of importing and selling Hunyadi Matyas water in the United States, after giving due notice, through Mr. Mendelson, to the

Apollinaris Company, the direct representative and agent of Saxlehner in the United States, and with which Company alone the public could deal.

The Eisner & Mendelson Company had thereafter freely imported and sold Hunyadi Matyas water in large quantities during the five years of the original term of the lease.

During this period, as shown by the evidence, some six or seven other Hunyadi waters had been also imported and sold in competition with the Hunyadi Janos water, and all used the three-panel labels with the red centre and the blue wings.

By this usage and custom of the trade, during these five years, the word "Hunyadi" had become a generic term, and the Apollinaris Company had acquiesced in the use of the red and blue three-panel label.

During the same period the Apollinaris Company had also affirmatively acknowledged that the word "Hunyadi" was generic, by its advertisements and publications, and by the continuous use of the diamond mark, and by the wide publicity thus given to the use of the diamond mark had substantially affirmatively acknowledged the abandonment of all claim of exclusive right to the red and blue label.

The Apollinaris Company had also especially acquiesced in the sale by the Eisner & Mendelson Company of the Hunyadi Matyas water under its label, by making no objection to the conduct of the business, or to the name "Hunyadi Matyas" or to the Hunyadi Matyas label, except in the case of the analysis mailing-slip matter, which, as we have seen, was promptly rectified by the defendant Company. The defendant, during these five years, had built up a large and extensive business in importing and selling Hunyadi Matyas water during this period, to the amount of hundreds of thousands of bottles a year.

The defendant company, therefore, relying, and with good reason to rely, on the above-stated acts

of omission or commission by the Apollinaris Company, renewed the lease for the further term of twenty years, commencing to run from March 1st, 1895, and under this extended lease has continued to import and sell the Hunyadi Matyas water, and is now so importing and selling the same. As to the large and extensive business thus carried on by the Eisner & Mendelson Company in the importation and sale of Hunyadi Matyas water and the expenses connected therewith, Mr. Eisner stated that said Company has approximately spent about twenty-five thousand dollars in advertising the said water since 1890. (Record, p. 357).

He gives at page 401 of the Record the number of bottles of Hunyadi Matyas water imported during the years of the lease up to January 1st, 1898, giving the importation by years. The amount aggregates about 1,700,000 bottles.

After all these years of equiescence, with the affirmative acts on the part of the Apollinaris Company, which we have referred to, showing abandonment and surrender of all claim to exclusive rights, the court is now asked to wreck and ruin this substantial business, the inevitable consequence of compelling the Eisner & Mendelson Company to discontinue the use of the word "Hunyadi Matyas," and the labels, bottles and capsules, identified and associated with said words, by and under which the water has been for so many years known and distinguished.

It is to be observed that at or about the time of the renewal of this lease, the Eisner & Mendelson Co. ceased to import the Hunyadi Laszlo water, the label of which is shown in the Brief of Petitioner as Exhibit D. The said Company commenced to use in the summer of 1893 the "Seal Brand" label, shown in said Brief as Exhibit C, and has continued to use the said label only up to the present time, excepting that in the spring of 1896 it imported a few hundred cases of Hunyadi Matyas water, No. 3, the sales of which were trivial and

unimportant. With this exception, the sales of Hunyadi Matyas water since the renewal of the lease have been confined to bottles to which the "Seal Brand" label was affixed, which the Circuit Court found the Defendant was justified in using on the ground that the Seal Brand label distinguished it from the complainant's Hunyadi Janos label and the other Hunyadi labels and bottles in the market.

The Law as applied to the facts.

It is claimed in petitioner's brief that the Court of Appeals dismissed the Bills, on the supposed authority of *Menendez* vs. *Holt*, and that its decision is in conflict with that case, and with the previous case of *McLean* vs. *Fleming*, and that the Appeal Court has substantially decided, against the authority of those cases, that mere delay for nine years bars the right to injunctive relief. With reference to this contention, we desire to say that the Circuit Court of Appeals decision shows on its face, that the Court did not decide that mere lapse of time for nine years barred the right to injunctive relief, but that it was not only the delay for nine years, but such delay continued for nine years *under circumstances showing surrender and loss of rights by acquiescence which led the Court to its decision.*

A review of the Supreme Court authorities will also show, that the decision of the Court of Appeals is not opposed to the law laid down in *McLean* vs. *Fleming*, *Menendez* vs. *Holt*, and subsequent decisions of this Court, where all relief has been denied on account of loss of rights by surrender and acquiescence.

It is true that the Supreme Court of the United States in the year 1887, in the suit of *McLean* vs. *Fleming*, 96 U. S. Rep., 245, laid down the general proposition that mere delay in bringing suit on a

trade-mark, while it will defeat the right to recover for past profits, will not ordinarily prevent injunctive relief.

In the year 1888, in the suit of *Menendez* vs. *Holt*, 128 U. S. Reports, 514, the Supreme Court was asked to reconsider the general proposition laid down in *McLean* vs. *Fleming*, but refused to do so. The Court, however, was very careful to state that this was a mere general proposition, and that the facts disclosed by the record in this suit of *Menendez* vs. *Holt* did not justify the Court in treating the case as an exception to the general rule.

The opinion of the Court makes it evident that in a case where proof of non-user of the trade-mark by the owner, or surrender of the use to the public by acquiescence, or otherwise, is shown, it would unhesitatingly refuse injunctive relief.

In addition to this, there is a line of Federal decisions, both in the Supreme and Circuit Courts, holding that, in trade-mark cases, in Patent suits, and in actions of a general character, long delay in bringing suit, where the facts show that the delay has been accompanied by acts or conduct showing such acquiescence, as would make injunctive relief inequitable, such relief should be denied.

In the suit of *Godden against Kimmell*, 99 U. S. Reports (1878), from pages 210 to 212, a summary of Supreme Court authorities is found in regard to the effect of laches and negligence in the assertion of alleged rights.

In the suit of *Speidel* v. *Henrici*, 120 U. S., pp. 377-397, it was held as follows:

"*Independently of any statute of limitations,*
"*Courts of Equity uniformly declined to assist a*
"*person who has slept upon his rights and shows*
"*no excuse for his laches in asserting them.* 'A
"*Court of Equity,*' *said Lord Camden,* '*has*
"*always refused its aid to stale demands, where*
"*the party slept upon his rights and acquiesced*

"for a great length of time. Nothing can call "forth this Court into activity but conscience, "good faith and reasonable diligence; where these "are wanting the Court is passive and does nothing. "Laches and neglect are always discountenanced, "and therefore from the beginning of this juris- "diction there has always been a limitation to "suits in this Court."

The case of *Speidel* v. *Henrici* has been followed in the subsequent case of *Richards* vs. *Mackall*, 124 U. S., 183, 188 (1887).

In the case of *Mackail* vs. *Casilear* (1890), 137 U. S., p. 566, the Court follows the same principle, and says:

"The doctrine of laches is based upon grounds "of public policy, which require, for the peace of "society, the discouragement of stale demands."

In *Hammond* v. *Hopkins*, (1891) 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the Court said:

"No rule of law is better settled than that a Court "of Equity will not aid a party whose application "is destitute of conscience, good faith and reason- "able diligence, but will discourage stale demands "for the peace of society, by refusing to interfere "where there has been gross laches in prosecuting "rights, or where long acquiescence in the asser- "on of adverse rights has occurred."

The Court also says in the same case at p. 274: *"The hour glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."*

In *Galliher* v. *Caldwell*, 145 U. S., 368, 371, (1891) it was said:

"The question of laches turns not simply upon "the number of years which have elapsed between

"the accruing of her rights, whatever they were, "and her assertion of them, but also upon the "nature and evidence of those rights, the changes "of value and other circumstances occurring "during the lapse of years. The cases are many "in which this defense has been involved and con- "sidered. It is true that by reason of their differ- "ences of fact no one case becomes an exact pre- "cedent for another, yet a uniform principle "pervades them all."

In the case of Foster *vs.* Mansfield, 146 U. S., p. 88 (1892), it was held as follows:

If a bill to set aside foreclosure sale of a railroad under a mortgage, on the ground of fraud and collusion, be not filed until ten yerrs after the sale, a presumption of fraud arises, which it is incumbent in the plaintiff to rebut.

The tendency of the Courts is, in such cases, to hold the plaintiff to a rigid compliance with the law, which demands not only that he should be ignorant of the fraud but should have used due diligence to inform himself of the facts.

In the subsequent suit of *Coats* vs. *Merrick Thread Co.*, 149 U. S. Rep., p. 562, the Court held that acquiescence of twelve years was sufficient to debar complainant from relief. The Court says as follows, at page 573 of said report:

"Indeed, the intent to imitate plaintiffs' spool "heads, if any such intent existed, is manifest "rather in the label than in the periphery, but "plaintiffs having submitted to this without pro- "test for twelve years, have waived their right to "relief upon this ground. McLaughlin v. *Peoples "R. Co., 21 Fed. Rep., 574; Ladd* v. *Cameron, 25 "Fed. Rep., 37; Green* v. *French, 4 Bann & Ard., "169, 3 Robinson, Patents, Sec. 11-94.".*

In the case of *Lane & Bodley Co.* vs. *Locke*, 150 U. S., p. 193 (1893), a period of twelve years acqui-

escence was held to bar the right of injunctive relief in suit for infringement of patent.

At page 201 the Court says: "*Courts of equity, "it has often been said, will not assist one who "has slept upon his rights and shows no excuse "for his laches in asserting them.*"

In the case of *Abraham* vs. *Ordway*, 158 U. S., pages 416, 420, the Court says:

"*Whether equity will interfere in cases of this "character must depend upon the special circum- "stances of each case. Sometimes the courts act in "obedience to statutes of limitations, sometimes in "analogy to them. But it is now well settled that, "independently of any limitation prescribed for "the guidance of courts of law, equity may, in the "exercise of its own inherent powers, refuse relief "where it is sought after undue and unexplained "delay, and when injustice would be done in the "particular case by granting the relief asked. It "will, in such cases, decline to extricate the plain- "tiff from the position in which he has inexcusably "placed himself, and leave him to such remedies "as he may have in a court of law.*"

In the case of *Gildersleeve* vs. *New Mexico Mining Company*, 161 U. S., pp. 573–578–579 (1895), various previous decisions on the subject of laches are reviewed, approved and applied.

In *Willard* v. *Woods*, 164 U. S., 502, 524, the Court said:

"*But the recognized doctrine of courts of equity "to withhold relief from those who have delayed "the assertion of their claims for an unreasonable "length of time may be applied in the discretion "of the court, even though the laches are not "pleaded or the bill demurred to.*"

The same doctrine was followed in the case of *Whitney* vs. *Fox*, 166 U. S., pages 637, 647 and 648.

In the recent and leading case of *Penn Mutual Life Insurance Co.* vs. *Austin*, 168 U. S., p. 685, (1898), the Court, after referring and quoting from previous decisions, says as follows, at pp. 697 and 698:

In Lane & Bodley Co. v. *Locke, 150 U. S., 193, and Mackall* v. *Cassilear, 137 U. S., 556, it was held, that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches, as expressed in the foregoing decisions, has been applied by this Court in so many cases besides those above referred to as to render the doctrine elementary.*

> " *Whitney* v. *Fox, 166 U. S., 637, 647,*
> " *648;*
> " *Gildersleeve* v. *New Mexico Min. Co.,*
> " *161 U. S., 573;*
> " *Abraham* v. *Ordway, 158 U. S., 416,*
> " *423;*
> " *Ware* v. *Galveston City Co., 146 U. S.,*
> " *102, 116;*
> " *Foster* v. *Mansfield, &c., R. R., 146*
> " *U. S., 88, 102;*
> " *Galliher* v. *Cadwell, supra, where the*
> " *earlier cases are fully reviewed;*
> " *Hoyt* v. *Latham, 143 U. S. 553;*
> " *Hanner* v. *Moulton, 138 U. S. 486, 495;*
> " *Richards* v. *Mackall, 124 U. S. 183,*
> " *189.*

" *The reason upon which the rule is based is not*
" *alone the lapse of time during which the neglect*
" *to enforce the right has existed, but the changes of*
" *condition which may have arisen during the*
" *period in which there has been neglect. In other*
" *words, where a court of equity finds that the posi-*

" tion of the parties has so changed that equitable " relief cannot be afforded without doing injustice, " or that the intervening rights of third persons " may be destroyed or seriously impaired, it will " not exert its equitable powers in order to save one " from the consequences of his own neglect. The " adjudicated cases, as said in Galliher vs. *Cald- " well, supra, 372, 'proceed on the assumption that " the party to whom laches is imputed has knowledge " of his rights and an ample opportunity to estab- " lish them in the proper form; that by reason of " his delay the adverse party has good reason to " believe that the alleged rights are worthless or have " been abandoned; and that because of the change in " condition or relations during this period of de- " lay, it would be an injustice to the latter to permit " him now to assert them.'"*

In the later case of *McIntire* vs. *Pryor*, 173 U. S., 38, 54 and 55, the Court makes it manifest that owing to the very exceptional facts of this particular case, the relief was granted, but that it did not intend to recede from its general position with regard to laches and acquiescence, appears by the following:

" We have no desire to qualify in any way the long line of cases in this Court, too numerous even for citation, in which we have held that where the fraud is constructive or is proved by inconclusive testimony, or evidence falling short of conviction, and the property has greatly increased in value, great diligence will be required in the assertion of the plaintiff's rights. But these were all cases either of bills to establish a trust, to open settled accounts, bills not involving fraud, or where the fraud was not clearly proven, or where with knowledge of the facts the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where the property has passed into the hands of persons innocent of the fraud, or with no actual notice that a fraud had been committed."

The Circuit Courts and Courts of Appeal have been equally clear in holding to the same principle and doctrine.

A most excellent summary of the authorities bearing on this point is found in the suit of *Prince's Metallic Paint Co.* vs. *Price Manufacturing Co.*, reported in 57 Fed. Rep., p. 938, in which case, the Court denied complainant all relief on account of eight years' acquiescence. The Court says, at page 994 of said report, as follows:

"*Now, it is true that, where the plaintiff's title to a trademark is clear, mere delay unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. Fullwood* vs. *Fullwood, 9 Ch. Div., 176; McLean* vs. *Fleming, 96 U. S., 245; Menendez* vs. *Holt 128 U. S., 514, 9 Sup. Ct. Rep., 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. Creath's Adm'r* vs. *Sims, 5 How., 192; Godden* vs. *Kimmell, 99 U. S., 201; Lansdale* vs. *Smith, 106 U. S., 391, 1 Sup. Ct. Rep, 350. Again and again it has been judicially declared that nothing can call into activity a a court of equity but "conscience, good faith and reasonable diligence." McKnight* vs. *Taylor, 1 How., 161; Sullivan* vs. *Railroad Co., 94 U. S., 806, 812. In McLaughlin* vs. *Railway Co., 21 Fed. Rep., 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. Ashhurst's Appeal, 60 Pa. St., 290, per Strong, J. In Lewis* vs. *Chapman, 3 Beav., 133, the Master of the Rolls refused an injunction to restrain the infringement of a copyright solely on the ground of six and a half*

years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. Browne, Trade-Marks, Sec. 497. Hence, in Manufacturing Co. vs. Garner, 55 Barb., 151, a delay of nine years in applying for an injunction to restrain infringement of a trademark was held to be good cause for refusing it."

In the suit of *Woodmanse Manufacturing Company* vs. *Williams*, 68 Federal Reporter, 489, 493, the Circuit Court of Appeals for the Sixth Circuit held, that fourteen years delay by a patent owner and his predecessors in interest, without making any attempt to assert their rights against an alleged infringing company openly engaged in making and selling a rival and competitive machine, was such laches as to require the dismissal of the Bill of Complaint.

It was further held that the knowledge and acquiescence of the former owners of a patent in an alleged infringement, has, in equity, the same effect upon an assignee's rights as his own neglect or acquiescence.

In the suit of *Richardson* vs. *D. M. Osborne & Co.* 82 Federal Reporter, page 95, the Circuit Court for the Northern District of New York, decided that a patentee who had acquiesced in the open and notorious infringement of his patent for sixteen years, could not maintain an action for such infringement, and that it was no excuse for the delay that co-owners of the patent would not agree to prosecute infringements.

The Circuit Court cites as authority for its holding, the following cases: *McLean* vs. *Fleming*, 96 U. S., 245; *Galliher* vs. *Caldwell*, 145 U. S., 368; *Menendez* vs. *Holt*, 128 U. S., 514; *Hardt* vs. *Heidweyer*, 152 U. S., 547; *Hammond* vs. *Hopkins*, 143 U.S. 524; *Lane & Bodley Co.* vs. *Locke*, 150 U.S.,

193; *Abraham* vs. *Ordway*, 158 U. S., 416; *Piatt* vs. *Vattier*, 9 Pet., 405; *Manufacturing Co.* vs. *Williams*, 15 C. C. A. 520; *Owen* vs. *Ladd*, 76, Fed., 992; *Wyeth* vs. *Stone*, 1 Story, 273; *Fosdick* vs. *Machine Shop*, 58 Fed., 817; *Keller* vs. *Stolzenbach*, 28 Fed. 81; *Prince's Metallic Paint Co.* vs. *Prince Manuf'g. Co.*, 6 C. C. A., 647; *New York Grape-Sugar Co.* vs. *Buffalo Grape-Sugar Co.*, 24 Fed., 604; *McLaughlin* vs. *Railway Co.*, 21 Fed., 574.

In the suits of *Starrett* vs. *Stevens Arms and Tool Company*, and *Same* vs. *Athol Machine Company*, 96 Federal Reporter, pp. 244-246, it was held that a delay of ten years by a patent owner after knowledge of an alleged infringement, was such laches as to debar, not merely the claim for profits, but any claim to the interposition of a Court of Equity.

In the very recent case of *Meyewitz* vs. *Eccleston*, 98 Federal Reporter, page 437, ten years' delay was held fatal to relief in a suit for infringement of a patent. The Court cites in support of its position the Supreme Court Case of *Lane & Bodley Co.* vs. *Locke*, 150 U. S., *Insurance Co.* vs. *City of Austin*, 168 U. S., 685, 697, and other authorities.

The above array and unbroken line of Federal decisions, when applied to the facts of this case, make any comment unnecessary and superfluous.

Minor Points.

It is claimed that Saxlehner's firm never intended to abandon or surrender their rights in the United States or elsewhere, and that this is manifested by the registration of trade-marks in the United States, and litigation in England and other countries.

As we have seen, the trade-mark of 1877 was not for the word "Hunyadi," but for "Hunyadi Janos," and Saxlehner could not have obtained registration here for the word "Hunyadi," as the name was generic in Hungary and substantially unknown here.

From 1877 to 1887, when the "Hunyadi" trade-mark was registered in the United States, the Hunyadi Janos water sold by the Apollinaris Company had met with no competition, and therefore in common parlance and by trade usage and custom *only*, had become known as "Hunyadi" water. In Hungary, the word "Hunyadi" was also generic.

It is obvious, therefore, that the only foundation for the registration, was the action of the Apollinaris Company in making the water known, and in selling it without competition up to that time. During the succeeding ten years, as the evidence shows, the word "Hunyadi" became generic in the United States, thereby depriving the registered trade-mark of all weight.

In England and other countries, with the exception of Hungary and the United States, no Hunyadi waters other than the Janos water, were imported or sold during the period of the Apollinaris contract, and therefore, in these countries, there being no competition, "Hunyadi" or "Eau de Janos" have been the alternative designations for Hunyadi Janos water.

With Reference to the English and Other Litigation.

In England, after the termination of its contract, the Apollinaris Company designated a spring owned by it in Hungary as "Apenta," devised a label and made a part thereof, the "Diamond Brand," which they had used on Hunyadi Janos water during the contract. On the label also appeared the words "Uj Hunyadi," meaning new Hunyadi. Suit was thereupon brought in England by the complainant to suppress the use of these words and the Diamond Brand on the Apenta label, on the ground that by the action of the Apollinaris Company during the period of the contract in using the said Diamond mark, and the fiduciary relations created by such

contract, the use of the Diamond mark and the word "Uj Hunyadi" should be suppressed. The English courts refused to grant an injunction against the use if the Diamond mark, but enjoined the Apollinaris Company from the use of the said words, on the ground of the fiduciary relations of the Apollinaris Company during the period of the contract, and because the word Hunyadi had never been lost in England, there being no substantial competition of other Hunyadi waters there, and the state of affairs being the exact opposite of the situation in the United States, where the sole and exclusive right to the word had been lost by acquiescence.

As to the claimed Accounting.

The counsel appears to urge that the petitioner is entitled to an accounting for profits and damages. We can hardly believe that this attempt is serious.

The delay of nine years in bringing suit, even if it had not been accompanied by the numerous acts of surrender, acquiescence and abandonment, would have been fatal in any event to an accounting under the decisions of *McLean* vs. *Fleming* 96 U. S., p. 245, and *Menendez* vs. *Holt*, 128 U. S., pp. 514–524.

The long list of authorities we have above cited, are also to the effect that in no event, under the circumstances and delay shown in the present case, could an accounting be granted.

As to the Siegel-Cooper, Marquet and Gies suits.

These suits were brought against the said defendants substantially for alleged palming off of Hunyadi Matyas water as and for Hunyadi Janos water.

The Court dismissed the bill in the Siegel-Cooper suit and granted injunctions against Marquet and Gies, restraining them from selling Hunyadi Matyas water as and for Hunyadi Janos water.

The defense of these suits was assumed by the Eisner Mendelson Company under the following circumstances:

In the fall of 1896 the complainant circulated very extensively among all persons interested in the sale of mineral waters, notices threatening suit against any one selling any other bitter water than Hunyadi Janos water under the name "Hunyadi," or using the red and blue label.

The Eisner & Mendelson Company replied by counter circulars, and guaranteed to defend all persons sued by complainant for the sale of Hunyadi Matyas water.

Under this guarantee, the defense of the Siegel-Cooper, Marquet and Gies suits was assumed by the said Company.

The Company assumed the defense of these suits on the assurance of the respective defendants that they had not palmed off Hunyadi Matyas water for Hunyadi Janos water as charged in the Bills of Complaint. Of course, the Eisner & Mendelson Company at the time was unaware of the complainant's evidence in regard to the matters in the suit.

If the Eisner & Mendelson Company had refused to defend these suits, the Company would have violated its guarantee, and, as in other instances where injunctions were obtained by default against the sale of other Hunyadi waters, the complainant would have published and exploited the fact that injunctions had been obtained against sellers of the Hunyadi Matyas water, if said suits had not been defended. In this way it is obvious that the sale of Hunyadi Matyas water would have been seriously injured.

It was for the above reasons that the Eisner & Mendelson Company assumed the defense of said suits.

The Eisner & Mendelson Company did not appeal from these decisions for the reason that the acts found as fraudulent by the Court were the acts of these defendants only, and, as we have stated, did not affect the legitimate sales of Hunyadi Matyas water in any way.

In conclusion, we would say that the facts which have been detailed above and which are in the main absolutely undisputed, show this cause to be, as the Court of Appeals finds, one of those exceptional cases, where delay and acquiescence has been continued so long and under such circumstances as to defeat any right to relief. We therefore contend that the decree of the Circuit Court of Appeals for the Second Circuit should be affirmed, and Petitioner denied the relief she seeks.

All of which is respectfully submitted.

EDMUND WETMORE,
CHARLES G. COE,
Of Counsel for Respondent.

Supreme Court of the United States. 1

EMILIE SAXLEHNER, Petitioner, vs. EISNER & MENDELSON COMPANY.	October Term, 1900. No. 29.

Notice of Motion.

TO EISNER & MENDELSON COMPANY, THE ABOVE NAMED DEFENDANT: 2

Please take notice that on Monday, January 7, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion to recall the mandate herein and to make the decree of the Supreme Court of the United States entered herein on October 15, 1900, more definite and certain, of which motion a copy is annexed, will be submitted to said Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a certificate of the Hon. Nathaniel Shipman, U. S. Circuit Judge, a petition and a brief will also be presented to the Court. A copy of the certificate and petition is herewith served upon you. 3

New York, December 21, 1900.

Respectfully,

ANTONIO KNAUTH,
ARTHUR v. BRIESEN, and
JOHN G. JOHNSON,
Advocates and of Counsel for Petitioner.

4 SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. EISNER & MENDELSON COMPANY.	October Term, 1900. No. 29.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Antonio Knauth, Arthur v. Briesen and John G. Johnson, her advocates and
5 counsel, and moves this Honorable Court to recall its mandate issued herein on the 20th day of November, 1900, to the Circuit Court of the United States for the Southern District of New York, for the purpose of amending the same, and to make its decree entered herein on the 15th day of October, 1900, more definite and certain concerning the relief to be granted to the complainant.

The matter involved herein relates to the protection of the petitioner in the exclusive use of her peculiar shape of bottle, label and capsule, used for her "Hunyadi Janos" bitter water, and each one thereof, and the question to be determined arises from the doubt of the Circuit Court as to whether
6 the direction contained in the last paragraph of said decree was meant to deny to the complainant the relief by injunction separately claimed in her bill of complaint upon her bottle, capsule and label, and each one thereof, and confine it to relief upon the label.

Dated December 21, 1900.

EMILIE SAXLEHNER,
Petitioner,
By ANTONIO KNAUTH,
ARTHUR V. BRIESEN and
JOHN G. JOHNSON,
Her Advocates and Counsel.

SUPREME COURT OF THE UNITED STATES. 7

EMILIE SAXLEHNER, Petitioner, vs. EISNER & MENDELSON COMPANY.	October Term, 1900. No. 29.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner, respectfully shows to this Court: 8

FIRST.—That on the 20th day of November, 1900, a mandate issued out of this Honorable Court to the Circuit Court of the United States for the Southern District of New York, which recited a decree of this Court entered herein on October 15, 1900, and was in words as follows:

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE [SEAL.] CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

WHEREAS, lately in the United States Circuit 9 Court of Appeals for the Second Circuit, in a cause between Emilie Saxlehner, appellant, and The Eisner & Mendelson Company, appellee, and The Eisner & Mendelson Company, appellant, and Emilie Saxlehner, appellee, on appeal and cross appeal, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 24th day of January, A. D. 1899, is in the following words, viz.:

"This cause came on to be heard on the transcript of record from the Circuit Court of the United

10 States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said Circuit Court be, and it hereby is, affirmed as to the name Hunyadi, but modified so as to dismiss the bill as to the red and blue label, with costs of this appeal to defendants.

It is further ordered, that a mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
E H. L."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals,
11 which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari* agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present Term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed, by this Court that the decree of the said United States Circuit Court of
12 Appeals in this cause be and the same is hereby reversed, with costs; and that the said Emilie Saxlehner recover against the said The Eisner & Mendelson Company three hundred and forty-four dollars and three cents for her costs herein expended and have execution therefor.

And it is further ordered, that this cause be and the same is hereby remanded to the Circuit Court of the United States for the Southern District of New York with directions to reinstate its decree of April 29, 1898, except so far as it denies to the plaintiff an injunction against the use of the Seal brand labels and damages sustained by such use; and for

further proceedings not inconsistent with the opinion 13
of this Court.

OCTOBER, 15, 1900.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,
Clerk of the Supreme Court 14
of the United States.

COSTS OF SAXLEHNER:

Clerk	$145.40
Printing Record	178.63
Attorney	20.00
	$344.03

SECOND.—That said mandate was filed in the said Circuit Court on November 26, 1900.

THIRD.—That thereafter, on December 10, 1900, your petitioner, the complainant, presented to Hon. Nathaniel Shipman, a Judge of said Circuit Court, a proposed decree for injunction and accounting in 15
which she prayed for injunctive relief upon her style of bottle, the same being of straight shape with a short neck, in connection with the sale of defendant's bitter water, and also for an injunction against the use of any imitation of her label. Said defendant presented a proposed decree confining complainant's relief by injunction to the use of imitating labels and not providing for any injunction upon the shape of the bottle, nor the capsule, except when used with the label.

FOURTH.—Contention thereupon arose as to whether it was the intention of this Honorable

16 Court, by its opinion herein filed October 15, 1900, to grant to the complainant the relief for injunction prayed in her bill of complaint upon her peculiar shape of bottle, the design of her capsule and label, and each one thereof, in accordance with the facts found and stated in the opinion of this Court, or whether the directions contained in the last paragraph of said opinion were meant to confine said injunction to the label only, in accordance with the terms of the decree of the Circuit Court of April 29, 1898, excepting therefrom only the provisions as to the seal brand label. The matter having been argued by counsel for complainant and defendant, the Judge to whom it was presented remained in
17 doubt, and he declined to sign any decree until such doubt should be removed by appropriate proceedings in this Court, and signed and delivered to complainant's counsel the statement dated December 17, 1900, hereto annexed.

FIFTH.—And your petitioner further represents that by such action of the Circuit Court, as aforesaid, she is unable to suppress the use of the labels, capsules and peculiar shape of bottles adopted by defendant in intended simulation of her style of bottles and labels for her Hunyadi Janos Water and is without remedy, and prays for an order that said mandate be recalled and that the decree of this Court entered in this cause on October 15, 1900, be
18 made more definite and certain so as to remove the doubt aforesaid and grant to petitioner a decree of injunction for imitation of her label, capsule and shape of bottle, and each one thereof, as prayed in her bill of complaint; and that your petitioner have such further or other relief as may be deemed proper and in the interest of justice.

And your petitioner will ever pray, &c.

EMILIE SAXLEHNER,
Petitioner,

By ANTONIO KNAUTH,
ARTHUR V. BRIESEN, and
JOHN G. JOHNSON,
Her Advocates and Counsel.

UNITED STATES CIRCUIT COURT, 19

SOUTHERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER,
Complainant,

vs.

EISNER & MENDELSON COMPANY,
Defendant.

20

SAME

vs.

SIEGEL-COOPER COMPANY.

SAME

vs.

RUDOLPH GIES. 21

SAME

vs.

LOUIS MARQUET.

Proposed decrees for injunction and accounting having been presented to me by counsel for the

complainant and the defendants in supposed accordance with the decrees of the Supreme Court of the United States herein dated October 15, 1900, and the several mandates issued thereon to this Court, I certify that I entertain doubt on the question whether said Supreme Court intended to grant to the complainant the relief upon the shape of the bottle prayed in her several bills of complaint herein apart from the label, or intended to confine the relief to the label, whether used with or without the bottle, and that for this reason I have declined to sign any decree herein until such doubt will be removed by appropriate proceedings in the United States Supreme Court.

Dated December 17, 1900.

N. SHIPMAN,
Circuit Judge.

Due service of the foregoing notice of motion, certificate, motion and petition is hereby admitted this day of December, 1900.

Defendant.

By

its Attorney and Counsel.

Supreme Court of the United States.

EMILIE SAXLEHNER, Petitioner, vs. EISNER & MENDELSON COMPANY.	October Term, 1900. No. 29.

BRIEF ON BEHALF OF PETITIONER ON MOTION TO MAKE DECREE MORE DEFINITE AND CERTAIN.

This motion is made at the suggestion and in consequence of the action of the Judge of the Circuit Court, to whom a proposed interlocutory decree was presented by the petitioner, complainant, praying for an injunction against the use of her style of bottle, label and capsule, substantially as prayed by her in her bill of complaint. The Judge declined to sign and enter such decree and likewise declined to enter a decree presented by the defendant, which latter was substantially like the decree originally entered by the Circuit Court on April 29, 1898, erasing therefrom such portions as related to the Seal Brand label. The Court, after carefully reading the opinion of this Court, delivered on October 15, 1900, remained in doubt as to whether the concluding clause of that

opinion directed him to enter a decree like that of April 29, 1898, with the Seal Brand label matter eliminated from it, or directed him to enter a decree containing the provisions of the former decree, but providing also for an injunction against the use of the bottle and capsule, to the protection of which the complainant had been found to be entitled and which had been found to be infringed upon by the defendant. Being unable to remove this doubt, the Circuit Court certified it, as shown by the moving papers, and the petitioner respectfully asks that the directions of the decree be made so definite and certain as to enable her to get the decree which she earnestly believes the Supreme Court intended to grant her.

This Court found:

> "2. That in the shape of his bottles, the "design of his capsules and his labels, he "(Saxlehner) was originally entitled to be "protected against a fraudulent imitation,"

and further:

> "We are of opinion, however, that as de- "fendant's bottle and label are a clear in- "fringement upon those of the plaintiff, it "would be destructive to her just rights to "permit the use of such bottles and labels by "the defendant, notwithstanding the affixing "of the Seal Brand, which is a mere private "mark of the importer."

This finding, which was the same in the Circuit Court, would clearly have entitled the complainant to an injunction in accordance with the prayer of her complaint, and, as we respectfully submit, entitles her to ask for such a decree now. The prayer of her complaint was to enjoin the defendant "from "procuring, parting with, selling or attempting to "sell within the said limits, any such water in any "bottle or vessel imitating or resembling in "form, color and general appearance those used "as aforesaid by your orator and her prede-

"cessor in business, OR bearing upon it any "capsule stamped in any manner imitating or "resembling the said capsules of your orator, OR "any label in form, color, design and general ap- "pearance imitating or resembling the said label of "your orator on the said bottles of Hunyadi Janos "water, and also from procuring, parting with or "selling or attempting to sell within said limits any "such water put up or contained in bottles resem- "bling and bearing capsules, marks and labels re- "sembling those of your orator" (Record, p. 6).

The Circuit Court unfortunately came to the opinion that the affixing of the Seal Brand labels sufficiently differentiated defendant's bottles for which reason the complainant could not then successfully insist upon all the relief as to the shape of the bottles and the design of the capsules which she had prayed, and for this reason the decree of April 29, 1898, only gave her an injunction upon her label whether used upon a bottle similar to complainant's or not. That same decree recites that the defendant has wrongfully and fraudulently sold "bitter water in bottles like those used "by complainant for her said Hunyadi Janos bitter "water, the same being of a straight shape with "a short neck and bearing labels," &c. (Record, p. 629), but fails to enjoin the defendant from the use of such bottles or of the capsules. The Circuit Court could not consistently grant to the complainant the injunction prayed by her upon these matters and at the same time hold that the affixing of the Seal Brand label to the same bottles excused the defendant.

The assignment of errors made by the complainant to the Circuit Court of Appeals included every portion of the relief which the complainant had prayed for and which had been withheld from her. It specified the matters on which the Circuit Court had found against the complainant, including specifically the Seal Brand label excuse, but could not specify the shape of the bottle, because on this the

Circuit Court had found in favor of the complainant, who therefore could complain only as to the insufficiency of the relief. This was done by the 11th assignment of errors. But even if insufficiently assigned, or not assigned, this Court undoubtedly had power to notice and correct the error of the Circuit Court in granting to the complainant insufficient relief.

U. S. vs. *Tennessee & C. R. Co.*, 176 *U. S.*, 242, 256.

We submit that under the facts of the case decided by the Circuit Court and approved by this Court, and according to precedent and authority, the complainant was entitled in the Circuit Court to relief by injunction upon each of the matters which had been adopted by her to distinguish her product from that of others, and as to which no defense had been proved, and that the bottle and capsule were as important elements to be protected as the label. The peculiar bottle described in the opinion of this Court adopted by Saxlehner and used by the defendant for the purpose of simulation, is one of the main insignia by which Saxlehner's property is recognized, and to enjoin the label merely, leaving the bottle and capsule in the hands of the defendant, does not give her the relief to which she is entitled.

In the case of *Manufacturing Co.* vs. *Trainer*, 101 U. S., 51, 54, this Court, speaking through Mr. Justice Field, said:

> "*The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed.*"

In accordance with this principle it has been the uniform practice of the courts, established by many adjudications, of enjoining a party guilty of unfair

competition from using not only the labels under which he sold his imitating wares, but also the bottles or packages by means of which he contrived to pass his goods as those of the complainant.

In the case of *Charles E. Hires Company* vs. *Consumers' Company*, 100 Fed. Rep., 809, the Circuit Court of Appeals for the Seventh Circuit enjoined a manufacturer of root beer from using a new and peculiar form of bottle adopted by the complainant as one of the distinguishing marks of his goods, saying:

> "*It was this distinguishing feature which caught the eye and abided permanently in the memory. Indeed, the Court below declared in its opinion that the changes made by the defendant in its label tended to deceive 'when taken in connection with the shape of the bottle,' thus clearly recognizing the fact that the form of the bottle employed was an effective factor in the deceptive practice. Any restraint, therefore, that did not include the form of bottle would be ineffective to stay the wrong*" (*pp.* 812 *to* 813).

The injunction granted by that Court was substantially that prayed in the bill of complaint herein.

The case of *Moxie Nerve Food Co.* vs. *Baumbach*, 32 Fed. Rep., 205, is another illustration, Judge Sabin, saying:

> "*There is room enough in the world for all, and so there are bottles and styles of packages enough for all; and if a man has an article which, either by accident or design, happens to have the same quality, and be entitled to the same descriptive class of goods, and of the same taste, flavor and color, as another's, and when used, is used in the same way, or is in imitation of another's article, and he finds that his neighbor is making money by vending such article of his own, why then, and in such case, let him use a different kind of bottle or package in placing his own preparation before the public, to the end that he*

may neither derive advantage over his neighbor, nor induce the party to buy one thing when they think that they are buying another" (p. 213).

The same principle has been applied to bottles of peculiar shape, capsules and other marks, in *Cook* vs. *Ross*, 73 Fed. Rep., 203; *Von Mumm* vs. *Frash*, 56 Fed. Rep., pp. 830, 839; *Pillsbury* vs. *Eagle*, 86 Fed. Rep., 608; *Proctor* vs. *Globe Refining Co.*, 92 Fed. Rep., 357; *Dennison Manufacturing Co.* vs. *Thomas Manufacturing Co.*, 94 Fed. Rep., 651; *Sawyer Crystal Blue Co.* vs. *Hubbard*, 32 Fed. Rep., 388, and many others.

It would seem to us to demand an especially strict application in a case where, as in the present case, the defendant is enabled to sell his product under the same trade name which was formerly the complainant's exclusive trade name, to wit, the name "Hunyadi." That being now the case, by the decision of this Court, the principle recently announced by this Court in the case of *Singer Manufacturing Co.* vs. *June Manufacturing Co.*, 163 U. S., p. 169, is directly applicable, namely, that where by public dedication, the right to a former trade name is lost, it is the duty of other parties using the same to so distinguish their goods as to make confusion and deception with the goods of the original manufacturer impossible. This is precisely the situation here, and if the complainant is unable to suppress, as the opinion of this Court says, "*the use of such bottles and labels by the defend-*" *ant*," she will not receive justice at the hands of our Courts. There is no more reason for allowing the defendant the use of that peculiar bottle, without the label, than for allowing the defendant the use of the label without the bottle. Each of them has been found distinctive and adopted by Saxlehner as a peculiar dress for his article and each of them has been found to have been fraudulently imitated and used by the defendant. A complete protection

can be obtained by her only if the defendant is enjoined from the use of every one of the matters imitated by it for deceptive purposes. This, we submit, was the opinion forcibly expressed by this Court in this case, but, in view of the doubt which is entertained by the Court below, we respectfully ask that the directions of the decree be made so certain as to enable the complainant to obtain a decree of injunction upon the style of bottle, label and capsule used by her and every one thereof, in accordance with her prayer of complaint.

Respectfully submitted,

ANTONIO KNAUTH,
JOHN G. JOHNSON, and
ARTHUR V. BRIESEN,
Of Counsel for Petitioner.

Office Supreme Court U. S.
FILED
JAN 7 1901
JAMES H. MCKENNEY, Clerk

No. 29.

Brief of Wetmore & Coe for Respondent

Filed Jan. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 29.

EMILIE SAXLEHNER,

Petitioner,

vs.

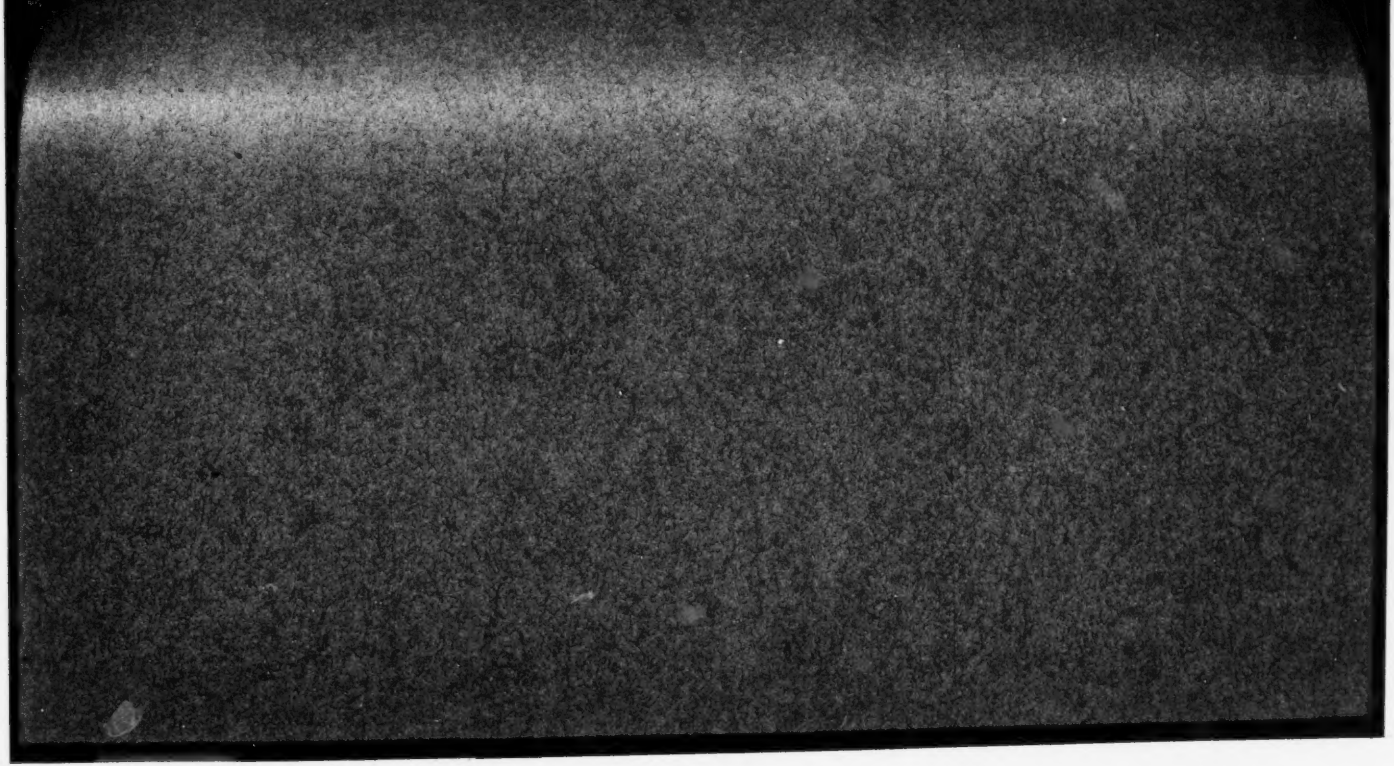
EISNER & MENDELSON CO.,

Respondent.

Brief for Respondent on Motion to Recall Mandate and Amend Decree.

EDMUND WETMORE,
CHARLES G. COE,
Of Counsel for Respondent.

Williamson Printing Company, 111 Fulton Street, N. Y.



Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

vs.

EISNER & MENDELSON COMPANY,
Respondent.

October Term,
1900.

No. 29.

BRIEF ON BEHALF OF RESPONDENT ON MOTION TO RECALL MANDATE AND AMEND DECREE.

The Counsel for petitioner base their motion to amend Decree substantially on two isolated statements quoted in their brief from the opinion of this Court, and endeavor to deduce therefrom the conclusion, that it was the intention of the Court to give the Complainant the exclusive right to the shape of the bottles in which Hunyadi Janos water is contained, and the capsules with which such bottles are provided, without regard to the character of the labels affixed thereto.

In other words, it is asserted that the complainant is entitled to enjoin the defendant from hereafter using that shape of bottle and the capsule, no matter how widely the label affixed to such bottles shall differ in design, color and resemblance from the Hunyadi Janos labels, or how dissimilar such labels shall render the whole general appearance of the bottles, and that this Court so intended by its opinion.

That this was not the intention of this Court is shown by the Mandatory portion of the opinion, which reads as follows:

> "While this label may have been adopted
> "in good faith, we do not think its employ-
> "ment would prevent the casual customer
> "from purchasing this water as that of the
> "plaintiff, and that the injunction should
> "also go against its use and that the plaintiff
> "should recover her damages therefor."
>
> "We are, therefore, of the opinion that
> "the decree of the Circuit Court of Appeals
> "must be reversed, and the case remanded
> "to the Circuit Court for the Southern
> "District of New York, with directions to
> "reinstate its decree of April 29, 1898, except
> "so far as it denies to the plaintiff an injunc-
> "tion against the use of the Seal Brand
> "labels, and damages sustained by such use,
> "and for further proceedings not inconsist-
> "ent with the opinion of this Court."

The Decree of the Circuit Court thus directed to be reinstated is in six paragraphs or sections, (Record, p. 629) in the fifth section of which alone is the Seal Brand label referred to, such section reading as follows:

> "It is not intended by this Decree to
> "restrain the defendant from the use of the
> "name 'Hunyady' or 'Hunyadi' as a
> "prefix to some other name than 'Janos,'
> "or to sell or advertise for sale its water as
> "Hunyadi water, nor from selling it under
> "the said red and blue label bearing the
> "name 'Hunyadi Matyas' in connection
> "with the defendant's 'Seal Brand' label
> "pasted thereon, and the injunction de-
> "manded by complainant against such use
> "of the name 'Hunyadi' or 'Hunyady'
> "alone, or as a prefix to some other name
> "than 'Janos' is hereby denied. No
> "damages for the sale of bottles of bitter
> "water bearing said red and blue Hunyadi
> "Matyas label in connection with the said
> "'Seal Brand' label pasted thereon are to
> "be recovered."

The meaning of this Court is therefore obvious. The Circuit Court is substantially directed to eliminate from its decree the matter in the Fifth section above quoted, relating to the Seal Brand label, to enjoin the use of the red and blue label in connection with the Seal Brand label pasted thereon, and to extend the accounting to cover the damages sustained by its use. With these exceptions, the decree is to be reinstated without further change.

That this was the real intention of the Court is made plain by its action in the Nielsen case. In this case, the Seal Brand label was not involved. The defendant, Nielsen, sold "Hunyadi Lajos" water under red and blue labels in the same shaped bottles provided with a like capsule as the "Hunyadi Matyas" and "Hunyadi Laszlo" bottles sold by the Eisner & Mendelson Company, and this Court directs the Circuit Court to reinstate its decree in the Nielsen case without change, the form of such decree being the same as the form of decree in the Eisner & Mendelson case, with the exception of the Seal Brand label, which was not involved in the Nielsen suit.

These decrees were framed by complainant's counsel and were settled by Judge Shipman in the form they wished, to especially differentiate the first four sections which they desired to have sustained, from the fifth and sixth sections which they desired to have reversed by the Circuit Court of Appeals, and with regard to which sections alone they assigned particular error. This is made plain by the assignment of errors (Record, p. 634), and explicitly and most clearly by the appeal (p. 637), which distinctly states that the complainant appealed from that portion of the decree denying the injunction with regard to the names Hunyadi and Hunyadi Matyas, from the refusal to enjoin the Seal Brand label, the recovery of damages therefor, and the reservation of the question of costs to entry of Final Decree, said matter being embodied in the fifth and sixth sections of the decree, leaving

the first four sections unappealed from by the complainant.

As can be seen by the petitior of the complainant for writ of certiorari, no claim was made to the shape of the capsuled bottle disconnected from its label, nor was it in any way asserted that either the Circuit Court or Court of Appeals had erred in not granting the complainant the shape of her bottles apart from the labels affixed thereto.

In view of these facts, we ask, in no captious or technical spirit, whether complainant's counsel can fairly claim that the defendant and the Courts were given to understand that the complainant asserted an exclusive right to the shape of the Hunyadi Janos capsuled bottle without regard to the appearance of the labels affixed thereto, by the vague and general 11th assignment of error, which is the only matter in the whole appeal record complainant's counsel can point to as indicating such an intention on their part.

II.

If there was one particular fact proved in this case, it was that the shape of the bottles in which Hunyadi Janos water was contained and the capsules with which such bottles were provided, had been for more than twenty years the common property of the Hungarian bitter water trade, both in Hungary and this country. This proved fact was borne in mind by Judge Shipman throughout the Circuit Court opinion, which recognizes no claim to the capsuled bottles apart from the label, and is especially supported by the following portion of the opinion.

> "In the spring of 1896 the Eisner & "Mendelson Company imported a few hun- "dred cases of another kind of Matyas "water which was called No 3, and which "they sold without the Seal brand and with

"3 marked upon the red and blue label. It "would not be an infringement, except for "the use of the three well known longitudinal "red and blue fields of the Saxlehner label, "the field covering the whole bottle, and the "red field in the middle with a medallion "portrait."

These Hunyadi Matyas No. 3 capsuled bottles were of identically the same shape as the other Hunyadi Matyas and the Hunyadi Laszlo bottles enjoined by the Circuit Court decree, and were only enjoined as labelled bottles because of the general resemblance of their labels to the Saxlehner label.

That the Circuit Court was absolutely right in so disregarding any claim on the part of the complainant to the shape of the Saxlehner capsuled bottles, except in connection with the label, is readily shown.

It was proved by undisputed testimony in this suit that, as the Supreme Court tersely says in its opinion in the Nielsen case, "from 1886, when the "Hunyadi Arpad water began to be imported, some "fourteen Hunyadi waters were put upon the "American market without opposition on the part "of Saxlehner or the Apollinaris Company, and "that the name 'Hunyadi' had been widely known "in this country as applicable to Hungarian bitter "waters."

These fourteen Hunyadi waters were all imported in capsuled bottles identical in shape with each other, and with the Hunyadi Janos bottles, and the shape of these capsuled bottles had become as widely known as the name "Hunyadi" as applicable to Hungarian bitter waters, and as indicating that such bottles contained not Hunyadi Janos water exclusively, but Hungarian bitter water generally.

But this was not all. It was proved by evidence introduced both by the complainant and defendant, that such shaped capsuled bottles were also used to put up Hungarian bitter water generally and were not limited to Hunyadi waters.

Two of such Hungarian bitter waters, the Victoria and Rakoczy Georgy waters were known, imported and sold in this country as early as the years 1883 or 1884 (Record, pp. 429, 430 and 431), and were sold thereafter in this market always contained in the same shaped capsuled bottles as the Hunyadi Janos bottles.

Judge Shipman (Record, p. 624) thus refers to these waters:

> "On May 2, 1892, the present Eisner & "Mendelson Company entered into a con- "tract with Ignatz Ungar & Sons for the sole "agency in the United States of their waters "from four Hungarian springs, the Hunyadi "Arpad, Hunyadi Bela, Victoria and "Rakoczy Georgy, and acquired by pur- "chase from Perrine & Co., the Ungar agents "in New York, their rights under the con- "tract which they had held. In April, 1892, "it acquired from a Paris corporation the "exclusive right to the sale in this country "of a Hungarian bitter-spring water called "'Hunyadi Laszlo.' These various waters, "with the exception of the Victoria and the "Georgy, were sold under the name Hunyadi "and with the red and blue label."

These Victoria and Rakoczy Georgy waters were produced on the part of defendant, but the complainant also produced in evidence and proved the sale in this country, of various other Hungarian bitter waters, not Hunyadi, put up for sale, and imported and sold in this country in the same shaped capsuled bottles as the Hunyadi Janos and other Hunyadi bottles. Prominent among these was the "Royal Hungarian Bitter Water," a specimen bottle of which water was offered in evidence by complainant's counsel at page 371 of the Record, and is thus referred to by this Court:

> "During 1889 and 1890 defendant imported "some twenty thousand bottles under the "name of 'Royal Hungarian Bitter Water' "under a red and white label devised by "themselves."

It was further shown on the part of complainant (Record, p. 181), that this same "Royal Hungarian Bitter Water" was sold in this market from 1880 to 1885 under a similar red and white label, bottle and capsule.

Another water referred to and introduced in evidence by complainant, coming from the vicinity of Buda-Pest, was the Aesculap Hungarian bitter water, which was proved to have been sold in this country (Record, p. 448), in the year 1890, and four or five years prior thereto, under the name of Aesculap water, in like shaped capsuled bottles provided with a white and red label. Still another Hungarian bitter water, not Hunyadi, was proved by the complainant to have been first sold in this country as early as the year 1876 continuously to the year 1890 by Paul Scherer (Record, p. 451), under a red and white label. This was the Franz Josef water, which after 1890 (p. 451), was sold by the agent of said Franz Josef water under a white label, and is on sale in this market at the present time. This Franz Josef water was bottled in Hungary and is now sold in this country, as it has always been, in imported bottles of the same shape and with the like appearing capsules as the Hunyadi Janos bottles and the fourteen other Hunyadi waters referred to above.

The testimony in this suit with reference to the mode of bottling Hungarian bitter waters is in exact accordance with the testimony in other suits in the Hunyadi litigation. Thus complainant's counsel produced in evidence, for their own purposes, the affidavit of Henrich Mattoni, in the suit of Apollinaris Company against Andres, in the 1887 litigation, sworn to January 12th, 1887, and set forth at pages 283–286 of Record.

With regard to the shape of the bottles, Mattoni says (p. 285), as follows:

> "And this affidavit (Heinrich Mattoni) "further saith, that the shape of the bottles "used in bottling the said Hunyadi Mathias

"water is an old shape of mineral water
"bottle, having been in use a long series of
"years by different parties and firms, and
"that the shape was not adopted by the said
"firm with any intention of infringing upon
"the said 'Hunyadi Janos' trade or trade-
"mark, but for the sake of its convenient
"and practical shape, and without any refer-
"ence whatever to the bottles used by the
"said Apollinaris Company, Limited, as
"aforesaid."

In the suit of Apollinaris Company against Unger, Joseph Ungar, in an affidavit sworn to June 20th, 1888, and set forth in the record at 577–583, gives at page 580 similar testimony with regard to the bottles as follows:

"There are at least fifteen springs in Buda,
"Hungary, producing bitter waters, and all
"of them use for the export trade bottles of
"same form, size and general appearance,
"and capsules of the same material and ap-
"pearance, only with a different stamp im-
"pressed thereon."

Ten years later, in the spring of 1897, came the suit of Saxlehner against Graef, brought by the complainant against the American agents of the Apollinaris Company, to restrain them from using the word Hunyadi, and the diamond brand label in connection with their Apenta bottles, capsules and labels, such capsuled bottles being of the same shape as the Hunyadi Janos and the other Hunyadi water bottles.

A motion for preliminary injunction was made and denied by the Court, whose decision is reported in 81 Federal Reporter p. 704.

This litigation was referred to throughout the record by the witnesses for both parties, and various matters and details thereof testified to.

Julius Price, a director and former secretary of the Apollinaris Company, makes a statement in an affidavit on part of the said Company, sworn to May 19, 1897, with regard to the shape of the bottles used for bottling Hungarian bitter waters. He says,

among other things, as follows at page 607 of the Record:

"It appears from the affidavit of Kalman "Saxlehner that when his father named his "spring Hunyadi Janos other springs were "then known under the names: Deak "Ferencz, Gr, Szechery, Erzebet and Hildy- "ardi."

"It is a fact, and indeed common knowl- "edge in the trade, that these waters were in "bottles similar in shape to the bottles then "used for Hunyadi Janos. The circumfer- "ence of these bottles at the shoulders was "greater than at the foot thereof. In con- "sequence of the numerous breakages owing "to this shape of bottle, the same was, upon "the representation of the Company, aban- "doned and the present shape adopted. "Such shape was before and after the slight "change above described and is common to "the trade and has been used to my knowl- "edge for 20 years for the numerous bitter "waters which are bottled at Budapest, such "as Franz Josef, Aesculap, Mattoni's Royal "Hungarian, and many others. It is not "true, as stated by the said Kalman Sax- "lehner, that since 1877 the bottles of Hun- "yadi water have been of the same shape."

"Throughout the whole course of our busi- "ness with Saxlehner, extending over 20 "years, he has never asserted or claimed any "exclusive right to the shape of bottle or "capsule employed by him for Hungarian "aperient water."

From the above testimony, which, as has been shown, was introduced by both Complainant and Defendant, it appears that for some twenty years Hungarian bitter waters generally have been bottled and sold both in Hungary and this country in the same shaped capsuled bottles as Saxlehner's Hunyadi Janos water, and that this mode of bottling has been for that period the common property of the trade.

It is also conclusively proved that during this period, such shaped bottle and its capsule had lost

all significance as indicating Hunyadi Janos water alone, but only indicated that such shaped bottle contained Hungarian bitter water of some sort, the particular kind of such bitter water being indicated by the name and label.

Hence it is clear that at the time this suit was commenced, the Complainant was not entitled to any exclusive right to the shape of her bottle or to the general appearance of her capsule.

III.

Complainant's Counsel in their brief herein, refer to a number of decisions in which the Courts have enjoined the general shape of a bottle or package.

As has been stated by this Court in its opinion, this case is mainly one of fact, and the facts in this Hunyadi litigation are shown to be exceptional and unique. It is, therefore, idle to cite decisions in other cases dependent on their own peculiar facts, in which the shape of a bottle has been enjoined.

It would be very much more pertinent if the Counsel had referred the Court to any decision in this Hunyadi litigation, which gave Complainant the right to the shape of the capsuled bottle without regard to the character of the label affixed thereto. Counsel can refer to no such decision.

No Court or tribunal in any contested suit, action or proceeding, has ever given the Complainant the exclusive right to the shape of her bottle, or enjoined others from using the same shape of capsuled bottles for Hungarian bitter water.

The Complainant reproduces in the Record (pp. 290–293) a circular sent by her to the trade, in which a number of decrees are referred to, in which the name Hunyadi with differing suffixes, and label trademarks, were cancelled by the Hungarian Minister of Commerce.

In many of these cases, the use of both the name and label were enjoined, because the name contained the word "Hunyadi" as a part thereof, and because the label resembled too closely the Hunyadi Janos label. In other cases, where the label or figure trademark alone was cancelled, such label did not display the name Hunyadi in any form, but such label trademark was cancelled because the Minister, on the evidence, considered that the label, while not using the name, Hunyadi, bore too great a resemblance in its appearance to the Hunyadi Janos label. All these different Hungarian bitter waters were sold in capsuled bottles of the same shape as the Hunyadi Janos bottles, and while, as we have seen, the Hungarian authorities have forbidden the use of the name Hunyadi and labels resembling the Hunyadi Janos labels, they have in no case forbidden the seller of Hungarian bitter waters, whose name and label trademarks were so cancelled, from continuing to use their capsuled bottles with other labels and names affixed thereto. The Hungarian authorities also have not interfered with that class of Hungarian bitter waters or with the trademarks registered for their names and labels, of which waters the Franz Josef and Asculap waters are a type, which have always used the same shape of capsuled bottles as the Hunyadi Janos and other Hunyadi waters, but have not used labels resembling the Saxlehner label.

The action of the Hungarian authorities, and the English and United States Courts, in thus recognizing that the shape of the bottles in which the Hunyadi Janos water is contained, is public property in Hungary, and the common property of importers and sellers of Hungarian bitter water in other countries, is well illustrated by the proceedings in the "Apenta" litigation.

In or about the year 1895, and about the time when the Apollinaris Company gave the requisite twelve months' notice to terminate the Apollinaris contract with Saxlehner, said company commenced

to have bottled and sold in its interest in Hungary, a Hungarian bitter water called Apenta water, under a label widely different in design and general appearance from the Saxlehner label. These labels were affixed to bottles identical in shape and provided with like appearing capsules to the bottles and capsules of the Hunyadi Janos water. While the sellers of this Apenta water had no prescriptive right acquired by use to the shape of such capsuled bottle, they adopted such bottles as a matter of course, because such bottles were the common and well recognized mode of bottling used for Hungarian bitter water.

On the Apenta label was printed the name, "Uj Hunyadi" or "New Hunyadi," which was registered as a trademark in Hungary in the interest of the Apollinaris Company.

The Hungarian Minister of Commerce cancelled such verbal trademark, but the Hungarian authorities have not interfered with the Apenta water in other respects, but have allowed the same to be freely sold in Hungary in the capsuled bottles identical in shape with the Hunyadi Janos bottles, for the reason that the Austro-Hungarian Empire does not recognize any right in Saxlehner to the bottles, which are regarded and treated as public property.

In the English Apenta litigation referred to in the opinion of this Court, the action of Court was the same as in Hungary. The Court while enjoining the Apollinaris Company from using the name "Uj Hunyadi" as a designation of its water, refused to enjoin the use of the Apenta label, or the bottle apart from the label.

In the Apenta litigation before the U. S. Circuit Court referred to above (81 F. R. p. 704) the Court denied a motion for preliminary injunction, refusing to enjoin either name, label or capsuled bottle.

Thus it is seen that all the Courts, both in Hungary and in other countries, recognize that the shape of the Hunyadi Janos bottles had for many years been the common property of the trade, and refuse to enjoin their use apart from the labels.

IV.

The grant to Complainant in this country of an exclusive right to the shape of the bottles in which Hunyadi Janos water is put up, and to the capsule, separate and apart from the design and appearance of the label, would be in the contravention of the Austro-Hungarian treaty of June 1st, 1872, which is referred to in the Opinion of this Court as follows:

> "By the first article of this treaty, 'every "reproduction of trade marks which, in the "countries or territories of the one of the "contracting parties, are affixed to certain "merchandise, * * * is forbidden in the "countries or territories of the other con- "tracting parties'; and by the same article, "'if the trademark has become public "property in the country of its origin, it shall "be equally free to all the territories of the "other of the two contracting parties.'"

As has been shown, the sale of Hungarian bitter water generally in the same shaped capsuled bottles as Saxlehner's Hunyadi Janos water, is not forbidden in Hungary, but the use of such bottles is permitted, for the reason that the Hungarian authorities sanction their use, because for upwards of twenty years such mode of bottling has been public property in Hungary and recognized as the common property of bottlers and dealers in Hungarian bitter water generally.

In conclusion, we desire to say that since the decisions of this Court in this Hunyadi litigation, the Defendant herein has designed and adopted, and is now using for its Hunyadi Matyas water, a label differing so widely in character, design and appearance from the Hunyadi Janos labels, and so changing the appearance of the bottle that the most unwary or incautious purchaser could not be misled into believing the contents of such bottle was Hunyadi Janos water. The label is as totally unlike the Hunyadi Janos label as the Apenta label, specimens of which Apenta labelled bottles were submitted in

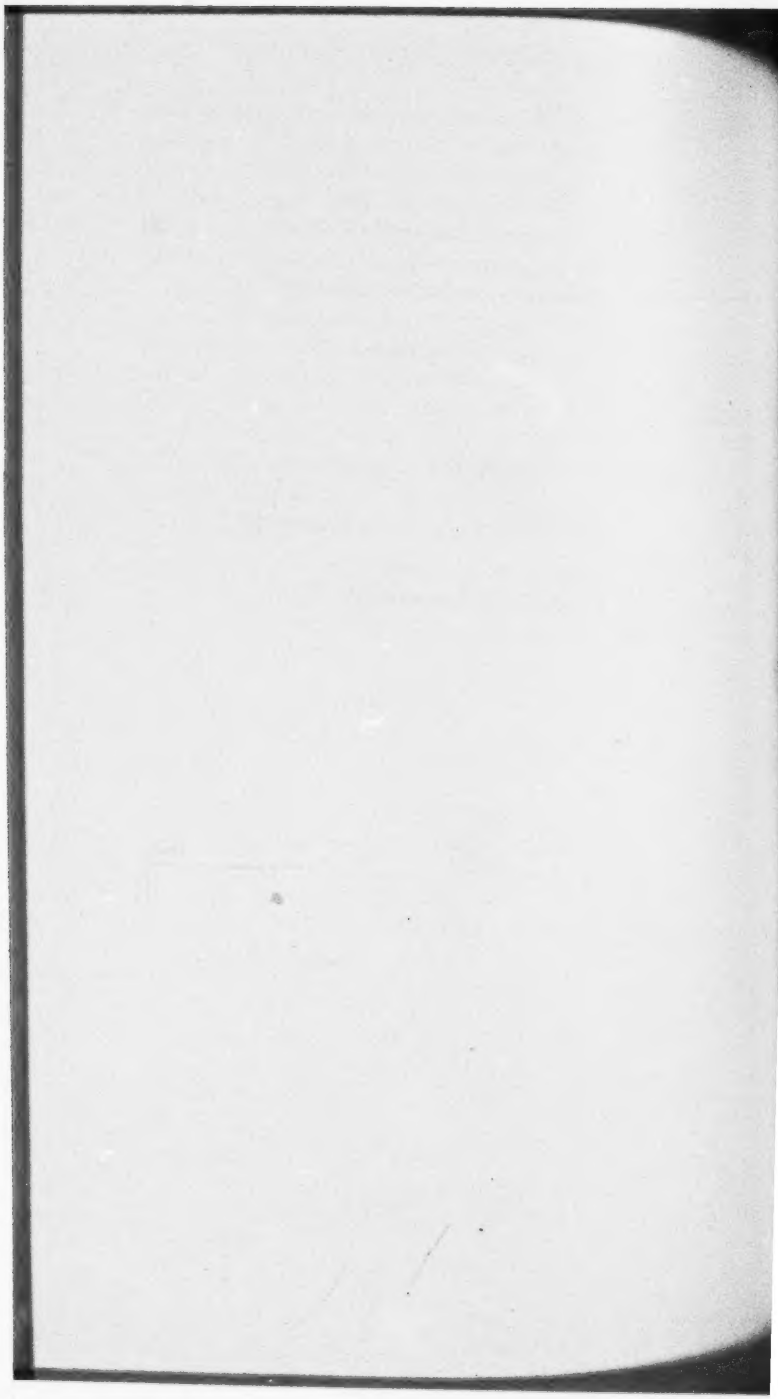
evidence. The Matyas water is bottled at the springs in Budapest and is there permitted to be put up for exportation in the same shaped capsuled bottles, which mode of bottling Matyas water has been used for more than twenty years. The bottles are labelled in this country after importation.

It would certainly be a great hardship, in view of the facts presented above, to enjoin the Eisner & Mendelson Company from using this shape of bottle when all other dealers in Hungarian bitter waters in every other country are permitted to use such shaped bottles.

The motion to recall Mandate and amend Decree should be denied.

All of which is respectfully submitted.

EDMUND WETMORE,
CHARLES G. COE.
Counsel for Respondent.



Supreme Court of the United States.

No. 29.—October Term, 1900.

Emilie Saxlehner, Petitioner, vs. The Eisner and Mendelson Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[October 15, 1900.]

This was a bill in equity filed in the Circuit Court for the Southern District of New York by the widow of Andreas Saxlehner, deceased, a resident of Buda-Pesth and a subject of the King of Hungary, against the Eisner and Mendelson Company, importers and wholesale dealers, to enjoin the defendant from selling any water under a name in which the word "Hunyadi" occurs, or making use in the sale of bitter waters of labels, in form, color, design and general appearance, imitating the labels used by plaintiff in the sale of Hunyadi Janos water.

The bill averred in substance that plaintiff's husband, Andreas Saxlehner, was, until May 24, 1889, the proprietor of a certain well within the city limits of Buda-Pesth, and that in 1863 he began to sell the waters of the same in the market under the name or trade-mark of "Hunyadi Janos;" that as his business increased he acquired additional territory, opened new wells, adopted a novel style of bottles and a peculiar label, and that the water soon became known in all the markets of the world under the name of "Hunyadi Janos," or in England and the United States under the name of "Hunyadi" alone; that in March, 1876, Saxlehner entered into a contract with the Apollinaris Company of London, under which such company was given the exclusive right to sell this water in Great Britain and the United States, and that such contract was not terminated until March, 1896; that this company used a label of similar design but of different color, and that large quantities of this water were exported by Saxlehner through such company and sold in the United States under the name of Hunyadi water; that Saxlehner died May 24, 1889, and plaintiff succeeded him in the business; that prior to his death Saxlehner obtained the registration in the Patent Office of the name "Hunyadi" as his trade-mark; that the defendant, knowing of these facts, had unlawfully imported and sold bitter water, not coming from plaintiff's wells, in bottles of identical shape and size as those used by plaintiff, and with labels in "close and fraudulent simulation of your orator's trade-mark," but under the name of "Hunyadi Laszlo" or "Hunyadi Matyas"—all in defiance of plaintiff's right, and with the design of imposing the waters upon the public as those of the plaintiff.

The answer denied the material allegations of the bill, and averred that in the year 1873, one Ignatius Markus, being the proprietor of a certain well within the limits of Buda-Pesth, applied to the proper authorities and was granted the registration of the name "Hunyadi Matyas" as a denomination of the waters of his spring, such authorities holding that the name was distinguished from that of the "Hunyadi Janos;" that "Hunyadi Janos," when anglicised, is John Hunyadi, the name of a celebrated Hungarian hero, and that the name "Hunyadi" is a common one in Hungary, and means of or from Hunyad, and that for this reason it is of itself incapable of exclusive appropriation by any one, being a common descriptive personal name, and also used to designate certain districts and towns in Hungary; that in the year 1889 the word had become a generic term, describing a kind of bitter aperient water, the peculiar product of a large number of wells in Hungary; that the shape of the bottle and the peculiarities of the label have become common property, and were adopted by every one who sold the Hunyadi water, whether under the name of "Hunyadi Janos," "Laszlo," "Matyas," "Arpad," &c., and that to the time of his death Saxlehner had never asserted or made any claim to the exclusive use of his style of bottle, or capsules, or labels; that in 1886 or 1887 the Apollinaris Company brought suit against the American agents of several of these waters and obtained temporary injunctions, which were subsequently dissolved upon evidence that the word "Hunyadi" was used in Hungary as part of the name of a number of different mineral waters, that Saxlehner refused to join with or aid the Apollinaris Company in opposing a dissolution of such injunctions, and that thereafter these waters were sold freely, openly and continuously in competition with the "Hunyadi Janos" in the bottles and with the labels and capsules affixed thereto as before stated, with the knowledge, consent and acquiescence of Saxlehner and his agents; that defendant, a Pennsylvania corporation, entered into a contract with the owners of the "Hunyadi Matyas" spring, and obtained the exclusive right to import their waters into the United States for the term of twenty-five years; that in 1890 it began to sell this water in like bottles and with like capsules and labels affixed thereto as now claimed by the plaintiff herein to be in violation of her claimed rights, which bottles, capsules and labels were similar to those in which the said "Hunyadi Matyas" water had been first imported, and that this was done with the consent of the American agent of the Apollinaris Company, who expressly stated that he had no objection to the label used by the defendant, nor to the way in which it was advertising the "Hunyadi Matyas" water; that in 1889 it also became the agent for sale in the United States of the "Hunyadi Arpad," "Hunyadi Laszlo" and "Hunyadi Bela" waters, and began to sell the same in large quantities; that these waters were put up for sale and sold in bottles similar to those

of the "Hunyadi Janos," with like capsules and labels; that these waters were sold in open competition with the "Hunyadi Janos" until some time in 1893, when plaintiff stopped said competition in part by purchasing the Arpad and Bela springs, and thereupon revoked the agency of the defendant to sell such waters; that in 1877 Saxlehner applied to the Commissioner of Patents for the registration of the words "Hunyadi Janos" as a trade-mark; that such trade-mark was registered September 11, 1877, by which proceeding he abandoned all claim and assertion of right to the word "Hunyadi" in and of itself, and that it had for many years previously been a generic term to designate this class of waters. The answer further alleged that the defendant, in order to designate the waters sold by it and to secure additional protection to the label used by it, registered the trade-mark "Hunyadi Matyas," since which time the defendant has used such trade-mark as stated therein, and in accordance therewith.

As the case depended almost wholly upon questions of fact, a somewhat elaborate statement of the evidence becomes necessary.

In 1862, Andreas Saxlehner discovered within the city limits of Buda-Pesth, Hungary, in a valley surrounded on all sides by hills acting as a natural barrier, secluding it from the outer world, a spring. which was named by him the "Hunyadi" spring, and on January 19, 1863, the municipal council of Buda granted him permission to sell the water taken from such spring and to give the spring the name of "Hunyadi," upon the payment of a small sum of money for hospital purposes. Soon after this he began to bottle the water of his spring and to sell it under the arbitrary name or trade-mark of "Hunyadi Janos;" in other words, John Hunyadi, a Hungarian hero of the fifteenth century. Several wells were subsequently sunk by him in the same valley to the number of about one hundred and twelve, all of which produced water, substantially of the same chemical combination, which is led through a system of pipes to large subterranean cisterns, from which it is taken and bottled. It soon began to be exported beyond the limits of Hungary to other European countries, and also to the United States.

Saxlehner was not, however, the first one in Hungary to put up the bitter waters with which that kingdom abounds, but others were already sold in the market, one of them being called "Hildegarde," and another "Franz Deak." Different bottles and labels were used for these waters, when Saxlehner adopted, in conjunction with the distinctive name of "Hunyadi Janos," a novel style of bottle of straight shape with a short neck, to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos, Budai Keserüviz Forrás," meaning "Hunyadi Janos, bitter water of Buda," together with a supposed portrait of the hero stamped thereon. He also adopted a peculiar label covering almost the whole body of the bottle, divided into three longitudinal

panels, the middle one of which bore the same portrait in a medallion, with the name of "Hunyadi Janos" written in large letters on the top of the label, the color of the middle panel being a reddish brown and the outer panels white. As this water was exported to and sold in the various countries of the world, a different custom concerning its appellation sprung up in different countries, the Latin races using the word "Janos" as the common appellation of the water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name of "Hunyadi" became its common appellation, it being known as Hunyadi water.

In 1872, it seems that one Ignatius Markus discovered a spring upon a plot of ground leased by him, which also produced bitter water of similar quality, and shortly thereafter petitioned the municipal council of Buda, not only for permission to sell the water, which was unconditionally granted upon the report of the town physician concerning the quality of the water found, but also to be allowed to name this spring "Hunyadi Matyas," and to bring the water into commerce under that name. This was denied, upon the petition and protest of Saxlehner, who claimed the exclusive right to the use of the name "Hunyadi." It was said that the granting of the denomination "Hunyadi Matyas" to another spring "would very likely, nay certainly lead both between the owners of the two springs and among the consuming public, to unpleasant misunderstandings, which it is the duty of the authorities to avoid and even to prevent. And further, the fact that petitioner, notwithstanding the many designations at his disposal, seeks to apply the name 'Hunyadi' to his spring, undoubtedly shows the not very noble intention on his part to avail himself of the great diffusion and good renown enjoyed by the Saxlehner Hunyadi Bitter Spring, both at home and abroad, which, however, cannot be tolerated by the authorities, and in the present case all the less, as it is a well known fact that Mr. Saxlehner was able to secure this good renown to his spring only through many years' labor and at considerable expense."

On a petition in appeal, however, to the Minister of Agriculture, in 1873, the decision of the council, which denied to Markus the permission to use the name "Hunyadi Matyas," was reversed, because of certain omissions by Saxlehner to conform to the local laws, and also because "Hunyadi Janos" and "Hunyadi Matyas" "represent two quite clearly different names, which may stand without any infringement to each other." This spring was afterwards registered in Buda-Pesth by the name of "Hunyadi Matyas," and thereupon the proprietors of other wells began to sell their waters in Europe under the name of Hunyadi with an added name, and also with the use of a close imitation of the red and white labels. It did not appear, however, that Markus sold any water or made

use of the permission granted to him by the Minister, or obtained a license from the local authorities; but, in 1876, the firm of Mattoni & Wille became the purchasers of the plot of ground leased by Markus and several other adjoining plots containing springs, and in that year registered a separate trade-mark and name for each of the six springs which they then acquired, among which was a trade-mark bearing the name "Hunyadi Matyas." In 1877 they began selling these waters in Hungary, claiming certain specific differences of composition of the various waters which recommended them for different purposes.

In February, 1876, Saxlehner made a contract with the Apollinaris Company, Limited, of London, by which that company agreed to purchase a certain quantity yearly, and Saxlehner bound himself for a term, which finally expired in 1896, to give the company the exclusive right to sell his "Hunyadi Janos" water in Great Britain, United States and other transmarine countries. The company agreed to purchase at least 100,000 bottles yearly until 1878, and at least 150,000 bottles thereafter at a stated price. In addition to this Saxlehner agreed not to fill any orders coming from the territory granted to the company, but to make them over to the company. A special label was designed to be used on the bottles sold by the company of substantially the same contents and characteristics, but of a different color, the body of the label being a dark blue, with a red or reddish brown central field. A narrow strip on the top of the label contained the name of the Apollinaris Company as the importer, and from the making of this contract large quantities of water bearing this label were exported and sold in the United States under the name of "Hunyadi Janos," or the shorter name "Hunyadi."

After April, 1889, and until the cancellation of the contract in 1896, this company placed upon each bottle of Janos water which it sold in this country a red diamond containing these words: "The red diamond is the trade-mark of the Apollinaris Company, Limited, and is meant only to indicate that the mineral waters so marked are sold by the Apollinaris Company, Limited."

In 1887, Saxlehner caused the name "Hunyadi" to be registered separately from "Janos" as a trade-mark in the United States Patent Office. In the statement accompanying this registration he was again careful to refer to the red and white or red and blue label upon which said trade-mark was used by him, and to repeat the caution that he did not in anywise intend by said registration to abridge his right to the exclusive use of said label as a whole, or to any of its features.

The Apollinaris Company embarked in the business of selling Hunyadi Janos water in the United States, but met with competition from one Scherer, who imported the water under the red and white label from Europe, buying it from parties who had purchased it from Saxlehner.

The company sought to enjoin Scherer from so selling upon the ground of its exclusive right within the United States, but failed in the suit. The case was decided in 1886, and reported in 27 Fed. Rep. 18.

In the same year Mattoni & Wille of Buda-Pesth consigned to one Andres in New York one hundred and twenty-one cases of Hunyadi Matyas water taken from one of four springs purchased by them, one of which was the original Markus spring above mentioned.

About the same time the firm of Ignatz Ungar & Son began to sell waters from a spring owned by them, which was designed "Hunyadi Arpad," through one Joseph Ungar as their agent. This water was put up in an imitation of Saxlehner's red and blue labels. The Matyas water was also put up in red and white labels of similar design. Suits were brought against them in 1886, in the Circuit Court of the United States, by the Apollinaris Company to enjoin the use of the name "Hunyadi" and of the labels. These suits were, however, withdrawn for want of jurisdiction, and two other cases, one against Andres and the other against Ungar, were brought by the Apollinaris Company in the Supreme Court of the State. *Ex parte* injunctions were issued in each case in February, 1887, and remained in force until July, 1888, when the injunction in the Ungar suit was dissolved upon application of the defendant, and soon thereafter the Andres suit was voluntarily discontinued. Saxlehner appeared to have had no knowledge of these suits, although an effort was made, which the court below found to have been unsuccessful, to show that he was notified of the motion to dissolve the injunction, and refused to assist in opposing it. The defendants in these suits seem to have relied largely upon the fact that, under the laws of Hungary, as they then were, they had a right to make use of the word "Hunyadi," provided they annexed thereto as a suffix a word different from "Janos," as for instance, "Matyas" or "Arpad," and that, having obtained permission by royal grant to make use of these names in Hungary, they were entitled to make use of the same names in other countries.

In the meantime, however, and in 1887, Saxlehner instituted another suit in Hungary to enjoin the use of the name "Hunyadi" as applied to a water sold there called the "Hunyadi Josef." He was again unsuccessful, not only in preventing the use of the word "Hunyadi," but even in preventing the use of colorable imitations of his red and white label, apparently on account of the lack of efficient statutes upon the subject of trade-marks. As one of the witnesses, Saxlehner's son, states, he was advised by his lawyer that before 1890 there was a statute which gave protection against so-called counterfeit or imitation labels and against literal imitations, but not imitations which were similar merely.

In 1890, a statute was passed which gave a protection to pictorial trade-marks only, but not to trade-marks designated by name. Plaintiff,

whose husband died in 1889, at once took advantage of this statute, and instituted suits against Mattoni & Wille, as well as a number of other infringers. In 1895, another act was passed giving protection to verbal trade-marks. The suit against Mattoni & Wille resulted in an order of the Minister of Commerce, November 26, 1894, canceling the several trade-marks of Hunyadi Matyas water, "because, according to the opinion of three experts consulted by the chamber, such trade-marks are similar in composition, design and color, and also for general impression to the trade-marks previously registered for the firm Saxlehner, and have been found to be imitations of the same and apt to mislead the public."

A similar suit instituted by plaintiff against the "Compagnie Générale d'Eaux Univerales et de Bains de Mer" resulted in a similar decree canceling the Hunyadi Laszlo label, "because of the three experts consulted, two have pronounced same to be entirely similar to the trade-mark registered for Saxlehner, and the danger of misleading is greatly augmented by the fact that on this trade-mark the name Hunyadi is applied in a prominent place."

The sale of the Hunyadi Laszlo water seems to have been practically stopped by this decree, but notwithstanding the decree against them of November 26, 1894, Mattoni & Wille continued to use the name Hunyadi Matyas separate from the label, and exported water as before to the defendant in this suit with red and blue labels, which were not registered in Hungary.

In 1895, however, another act was passed in Hungary for the registration of words or names as trade-marks. Plaintiff took advantage of this, registered the name "Hunyadi" as a trade-mark, and promptly instituted another suit against Mattoni & Wille, which resulted, in 1896, in another decree canceling, not only the illustrated trade-marks, but the verbal trade-mark Hunyadi Matyas, and awarding to the plaintiff a priority of right to the exclusive use of the words "Hunyadi Janos" and "Hunyadi" alone, both as a commercial denomination as well as a trade-mark. In the decree of the Minister the prior decree of the Minister of Agriculture of the year 1873, legalizing the use of Hunyadi Matyas, was referred to and treated as superseded by the laws of 1890 and 1895. "There is," says he, "therefore absolutely no connection between that decision and the case now under consideration." Similar decrees were rendered the same year against other defendants who sought to appropriate the name Hunyadi, including "Hunyadi Josef," against which Saxlehner had been unsuccessful in 1887; "Hunyadi Lajos," and also "Uj Hunyadi" or new Hunyadi, whose litigation against Saxlehner seems to have been carried on in the interest of the Apollinaris Company.

In fact, this litigation seems to have resulted in a complete vindication of the right of Saxlehner to the use of the word "Hunyadi."

Promptly upon the rendition of these decrees, and early in 1897, this suit, as well as the others hereinafter mentioned, was instituted.

The case came on for hearing before the Circuit Court upon pleadings and proofs, and resulted in a decree enjoining the defendant from selling, or offering for sale, any bitter water not coming from the "Hunyadi Janos" wells of the plaintiff in bottles of a straight shape, with a short neck, and bearing labels in color, size, shape and general design so closely similar to plaintiff's said label as to be calculated to deceive, but permitting the defendant to make use of the name "Hunyadi" as a prefix to some other name than "Janos," and denying the injunction demanded by the plaintiff against the use of the name "Hunyadi." (88 Fed. Rep. 61.)

On appeal to the Circuit Court of Appeals, the decree of the Circuit Court was affirmed as to the name "Hunyadi," but reversed as to the label, and the bill dismissed. (63 U. S. App. 139, 145.)

Mr. Justice BROWN, after stating the case as above, delivered the opinion of the Court.

This case involves the question of plaintiff's exclusive right to the use of the name "Hunyadi" as a trade-mark for Hungarian bitter waters, as well as her right to the red and blue label and its characteristic features used by her upon the bottles in which she has been accustomed to sell "Hunyadi Janos" water.

From the foregoing summary of the facts it appears:

1. That Saxlehner was the first to appropriate and use the name "Hunyadi" as a trade-mark for bitter waters, and that such name being neither descriptive nor geographical, but purely arbitrary and fanciful as applied to medicinal waters, was the proper subject of a trade-mark;

2. That in the shape of his bottles, the design of his capsules and his labels, he was originally entitled to be protected against a fraudulent imitation;

3. That the defendant is selling a water under the name of "Hunyadi Matyas" in bottles of the same size and shape as the plaintiff's, containing a label in three parallel panels of the same colors, size and general design as those of the plaintiff, that their general appearance is such as to deceive the casual purchaser, and that such bottles and labels were evidently designed for the purpose of imposing the defendant's waters upon the public as those of the plaintiff. A moment's comparison of the two labels will show that, while the printed matter upon each is different from that upon the other, their general resemblance is such as would be likely to mislead the public into the purchasing of one for the other. While the proprietors of the "Hunyadi Matyas" water undoubtedly found a justification for their use of the word Hunyadi in the decision of

the Minister of Agriculture of 1873, that decision did not cover the use of the simulated label, the adoption of which seems to have been an act of undisguised piracy.

Practically, the only defenses pressed upon our attention are those of abandonment and laches.

1. To establish the defense of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. (*Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 186; *Moore* v. *Stephenson*, 27 Conn. 13; *Livermore* v. *White*, 74 Me. 452; *Judson* v. *Malloy*, 40 Cal. 299; *Hickman* v. *Link*, 116 Mo. 123.) And in a recent English case this doctrine has been applied to a case of trade-marks. (*Mouson* v. *Boehm*, 26 Ch. Div. 398.) With regard to the defense of abandonment, it may with confidence be said that there is but very slight evidence of any personal intention on the part of Andreas Saxlehner or his wife to abandon the use of the word "Hunyadi" or dedicate the same to the public, and none at all of an intent to abandon the peculiar bottles and labels in connection with which he sold his waters. In fact, Saxlehner's whole life was a constant protest against the use by others of the name "Hunyadi." He discovered his spring in 1862, and in 1863 obtained permission to give it the name of Hunyadi Spring. He carried on an uninterrupted trade under that name until 1872. It also appears from the certificate of the Chamber of Commerce and Industry that the trade-mark "Hunyadi Janos" was, on December 12, 1872, registered, and that previously to such registration no trade-mark was entered in which the name "Hunyadi" or "Janos" was contained. It further appears that Ignatius Markus had no sooner petitioned the town council for a license to apply to his spring the name of "Hunyadi Matyas" than Saxlehner entered his protest, and was at first successful, but was finally defeated, and that upon the strength of this decision other springs were opened by various parties under trade-marks, of which the word "Hunyadi" was the principal component. At that time, owing to the inefficacy of the Hungarian laws upon the subject of trade-marks, he could do no more. In 1877 he registered the trade-mark "Hunyadi Janos" in the Patent Office of the United States. In 1884 he registered both his red and white and red and blue labels in the Buda-Pesth Chamber of Commerce, the latter being intended for use by the Apollinaris Company. In 1887 he instituted an unsuccessful suit in Hungary against the use of the words "Hunyadi Josef." Upon the passage of the Hungarian law of 1890, legalizing the use of pictorial trade-marks, the plaintiff again registered the three labels, and in the following year instituted suits against

all infringers in Hungary, which finally resulted in a complete establishment of her rights to the name Hunyadi. In 1887 Saxlehner registered the word "Hunyadi" as his trade-mark in the Patent Office of the United States, and in 1895, when the act for the protection of verbal trade-marks was enacted, plaintiff registered the same word in Hungary. Saxlehner appears, however, to have successfully protested against Mattoni & Wille's registration of "Hunyadi Matyas" in Germany. In June, 1896, plaintiff also instituted a suit against the Apollinaris Company in England, and obtained a final injunction against the illegal use of the name "Hunyadi." In the decree of the Court of Chancery, which is reproduced, it was ordered that the Apollinaris Company deliver up to the plaintiff for destruction all labels, trade documents and capsules in their possession which, by reason of their exhibiting the name "Hunyadi," are capable of being used for business in the United Kingdom for any Hungarian Bitter Water not being Hunyadi Janos water. Immediately upon the determination of the Hungarian litigation, and in the spring of 1897, plaintiff began these suits.

There is nothing in these facts tending to show an abandonment by Saxlehner or the plaintiff of their rights either in the name of Hunyadi or in the labels, unless it be the fact that the trade-mark registered in the United States in 1887 contained the words "Hunyadi Janos," which, it is insisted, was a waiver of a right thereafter to register the name "Hunyadi" alone. That position, however, assumes that, in the absence of such re-registration, other dealers would have the right to seize upon and appropriate the principal word "Hunyadi" of the prior trade-mark, provided they changed the final word and substituted another. We are not prepared to endorse this contention. It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. It was said by Vice-Chancellor Shadwell, in 1847, "that if a thing contains twenty-five parts and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud." (*Guinness* v. *Ulmer*, 10 Law Times, 127.) While this may be a somewhat exaggerated statement, the reports are full of cases where bills have been sustained for the infringement of one of several words of a trade-mark. (*Shrimpton* v. *Laight*, 18 Beav. 164; *Clement* v. *Maddick*, 1 Giff. 98; *Hostetter* v. *Vowinkle*, 1 Dill. 329; *Morse* v. *Worrell*, 9 Am. Law Review, 368; *Grillon* v. *Guenin*, Weekly Notes (1877), 14; *American Grocer Pub. Co.* v. *Grocer Pub Co.*, 25 Hun, 398.) It would seem that the registration in 1887 of the single word "Hunyadi" was really unnecessary for the protection of Saxlehner's rights, though we see no reason for holding the former registration an estoppel. The evidence

shows that these Hungarian bitter waters were largely known in this country as Hunyadi waters, and that in a certain sense Hunyadi had become a generic word for them. Of course, if it became such with the assent and acquiescence of Saxlehner, he could not thereafter assert his right to its exclusive use. But as this appropriation was made against his constant protest, and as he apparently made every effort in his power to put a stop to the use of it, it ought not to be charged up against his claim that the word had become generic.

It is contended, however, that the conduct of the Apollinaris Company was such as to show an abandonment both of the name and label, and that plaintiff is estopped by their act in further asserting title to them. This defense presupposes that the Apollinaris Company had power to bind Sexlehner by its admission and contract. Certainly the contract gave it no such power in express terms. Saxlehner did not purport to make the company his agent. He agreed to sell the company a certain number of cases of his water at a certain price, and also agreed to sell to no one else during the pendency of the contract. It was agreed that their consignments should carry the label "Sole importers, Apollinaris Company, Limited, 19 Regent street, London, S. W." The company agreed not to compete with Saxlehner upon the continent, and upon his part he agreed to make over to the company all orders arising from countries reserved to it, as well as to refuse such orders where he had good reason to suppose they were intended for such countries. This is practically all there is of the contract. No agreement was made with respect to the trade-mark or the good will of the business, and the company reserved the right, which it subsequently exercised, of canceling the contract upon notice. While such contract may have authorized the company to prosecute infringers here, and in the conduct of those particular suits Saxlehner may have been bound, it did not agree to do so or preclude the institution of other suits by him, nor was there any authority on the part of the company to bind him by its admissions.

The conduct of the Apollinaris Company, relied upon as evidence of abandonment, consists principally in the discontinuance of the two suits against Ungar and Andres after preliminary injunctions had been obtained (Saxlehner was not shown to have had knowledge of these suits); of a conversation between Mendelson, treasurer of the defendant company, and Steinkopf, a director of the Apollinaris Company in London, in which Mendelson spoke of his intention to sell the Hunyadi Matyas water, of which he had obtained control, and Steinkopf stated "that he could have no objection to that; that there were other Hunyadi waters," and of some other statements equally unimportant. There is little in any of these indicative of an intent on the part of the Apollinaris Company to abandon its exclusive right to the use of the word "Hun-

yadi" in America. Certainly, nothing indicative of such an intent on the part of Saxlehner, whose conduct in Hungary was wholly inconsistent with that theory. Evidence that the Apollinaris Company intended to abandon an exclusive right to the name Hunyadi might be sufficient as against them to defeat a suit for an injunction, but would not be binding upon the plaintiff unless done with her knowledge and acquiescence.

2. The defense of laches depends upon somewhat different considerations, and, so far as it applies to the use of the word "Hunyadi," we think it is established. It appears that after the decision of the Minister of Agriculture in 1873 sustaining the claim of Markus to the trade-mark "Hunyadi Matyas," other springs were opened whose waters were bottled under different trade-marks, in all of which the word "Hunyadi" was a component, and as early as 1886 these waters found their way to the United States, and were put on sale here with the knowledge of the Apollinaris Company. There is no evidence that Saxlehner had personal knowledge of these infringements, and while something may be said in his favor in view of his persistent efforts to establish his rights in Hungary, he was bound to know the law in this country, and to take steps within a reasonable time to vindicate his rights. The infringers were making use of their trade-marks under licenses from the Hungarian Government, and we see no reason to doubt that they were proceeding in good faith to dispose of their waters under the trade-marks registered in Hungary. Under these circumstances, if Saxlehner had intended to assert his rights under the laws of this country, to the exclusive use of the word "Hunyadi," he was bound to act with reasonable promptness. It is true that he may have supposed the Apollinaris Company would assert his rights in that particular for their own benefit; but if, as we have already held, he was not bound by their admissions, he is in no position to take advantage of their inaction, and, as against traders who were selling bitter waters under trade-marks legalized by the Hungarian Government, he should not have waited until the name "Hunyadi" had become generic in this country, and indicative of this whole class of medicinal waters.

We do not find it necessary to decide exactly what effect shall be given to the various decrees of the Hungarian ministers and courts. It is quite sufficient to observe that the use of the words "Hunyadi Matyas" was expressly sanctioned within the Kingdom of Hungary by the Minister of Agriculture in 1873, and it would seem that under our treaty with the Austro-Hungarian Empire of June 1, 1872, (17 Stat. 917,) the right to use the word became available in the United States. By the first article of this treaty "every reproduction of trade-marks which, in the countries or territories of the one of the contracting parties, are affixed to certain merchandise . . . is forbidden in the countries or territories of the other of the contracting parties;" and by the same article, "If the trade-

mark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties." In view of the decision of the Minister of Agriculture of 1873, sustaining the trade-mark "Hunyadi Matyas," and the subsequent adoption of the word "Hunyadi" in connection with some other word by numerous proprietors of similar waters, it seems to be clear that the word became and continued to be for twenty years public property in the Kingdom of Hungary, and it is difficult to escape the conclusion that it also became so here. It is true the law of Hungary was subsequently changed in this particular, and that the courts of that country held the plaintiff entitled to the benefit of that change; but it needs no argument to show that, if the word once became public property here, a subsequent change in the law in her own country would not enure to the advantage of the plaintiff here. The right to individual appropriation once lost is gone forever.

If, upon the other hand, we assume that the case can be decided without reference to the law of Hungary or the decisions of its officers and courts, the plaintiff is still at a disadvantage by reason of not instituting her suits more promptly. Saxlehner knew as a matter of fact that the Minister of Agriculture had overruled his protest, and that the word "Hunyadi" had become public property in the Kingdom of Hungary. He knew that a large number of dealers would appropriate the word, and that he was himself selling a large quantity of bitter water in the United States. He must also have known, or at least had good reason to know, that his competitors were doing the same thing. Under such circumstances he should have instituted inquiries upon his own account, and, regardless of his contract with the Apollinaris Company, have seen to it that his own interests were protected. If the Apollinaris Company were not his agent for the protection of his rights in the United States, then it was incumbent upon him to assert such rights personally or through some other recognized medium. In now invoking our laws, his successor is bound to show that she has complied with our requirements of diligence and promptness in instituting suit. She has failed in this particular. By twenty years of inaction she has permitted the use of the word by numerous other importers, and it is now too late to resuscitate her original title.

3. This argument, however, has but a limited application to the appropriation of the bottles and red and blue labels covering them, which appear to have been seized upon by the proprietors of the Matyas spring as well as by others, without a shadow of justification and in fraud of plaintiff's rights. As already stated, Saxlehner, when he began selling his water, adopted not only the name "Hunyadi Janos," but a straight bottle with a short neck, to the top of which was attached a metal capsule

with an inscription, as well as a peculiar label, covering almost the whole body of the bottle, divided into three rectangular panels of red and white, which at the time of his contract with the Apollinaris Company was changed to red and blue, so far as it applied to waters sold to that company for the American market. A narrow strip on the top of the label was added, containing the imprint of the Apollinaris Company as importers, and from 1876, the date of the contract, until 1886 the business was carried on by the Apollinaris Company in this country without any important competitors. In 1886, however, Mattoni & Wille began to consign "Hunyadi Matyas" bitter water to New York, put up in bottles bearing a red and white label. In 1889 the Eisner & Mendelson Company, defendant herein, made a contract with Mattoni & Wille, by which it obtained the sole agency for the United States and Canada for the sale of their bitter waters for the term of twenty years. During 1889 and 1890 defendant imported some twenty thousand bottles under the name of "Royal Hungarian Bitter Water," under a red and white label devised by themselves. In 1890 the defendant took a new lease for five years, with an option for a renewal for twenty years, from Mattoni of the Hunyadi Matyas spring. The Circuit Court found in this connection that "the reason which induced Eisner to make this lease was his desire to control the American label, so that neither Mattoni & Wille nor European producers could interfere with the American trade. A new label was therefore forthwith devised by Eisner, which was a reddish brown and blue label, and is described in the complaint containing the name 'Hunyadi Matyas,' 'Buda Keserüviz' and a medallion portrait of King Stephen in the center of the red division. He intentionally simulated the Saxlehner United States label for the purpose of obtaining, by means of the simulation, part of the good will which the Janos water had gained."

We are pointed to no decision of the Hungarian authorities authorizing the use of Saxlehner's label by other parties. The petition of Markus did not ask for permission to use it. The decision of 1873 did not grant it. The decree favorable to Saxlehner did not mention it, but dealt only with the name "Hunyadi." Notwithstanding repeated violations of his label, he seems to have been unable to obtain redress on account of the inefficacy of the laws until 1896, when a competitive trade-mark was ordered to be canceled in his favor by reason of its resemblance to Saxlehner's label, as well as by the use of the word "Hunyadi." In all his applications, both in Hungary and the United States, for the registration of his trade-mark name, there is an express reservation of his right to the medallion head of Hunyadi and to his label. Indeed, we find no authority whatever for the appropriation of this label by any of Saxlehner's competitors, and nothing to show that it was not a case of undisguised piracy. The only justification for its appropriation now

insisted upon is the fact that, by general use in this country for the past ten years, it has come to be recognized as a kind of generic label applicable to all Hungarian bitter waters, and if Saxlehner had originally an exclusive right to make use of it, that right has been lost by his acquiescence and that of the Apollinaris Company in its general use by other importers. But in cases of actual fraud, as we have repeatedly held, notably in the recent case of *McIntyre* v. *Pryor*, (173 U. S. 38,) the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence.

As applicable to trade-marks, two cases in this court are illustrative of this principle. In *McLean* v. *Fleming*, (96 U. S. 245,) there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that "equity courts will not, in general, refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits." An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits. See also *Harrison* v. *Taylor*, 11 Jurist, (N. S.) 408. An effort was made in *Menendez* v. *Holt*, (128 U. S. 514,) to obtain a reconsideration of the principle of *McLean* v. *Fleming*, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But the Chief Justice observed: "The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, . . . nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right." (*Fullwood* v. *Fullwood*, 9 Chan. Div. 176.) . . . "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but

so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

In the case under consideration we do not see how it is possible to wring an abandonment on the part of Saxlehner or the plaintiff from the repeated and persistent efforts made by them in Hungary to assert their rights. But it was not until the law was amended in 1895 that these efforts were successful. It can scarcely be wondered at that, in view of the disabilities under which he labored in his own country, Saxlehner should have thought it futile to undertake the prosecution of his rights in a distant land. As the defendant is unable to call to his assistance any authority from the home government for the use of these simulated labels, and as they and their vendors in Hungary seized upon these labels with knowledge of Saxlehner's rights, it is no hardship to enjoin their further use, and to hold defendant liable for such profits as it may have realized or for such damages as the plaintiff may have sustained by reason of the illegal use.

It seems, however, that in 1893 the defendant company began to affix to their bottles of Matyas water an additional label, consisting of a red seal upon a white ground, and containing the words "Ask for the Seal brand. This label has been adopted to protect the public from imitation and as a guarantee of the genuineness of the Hunyadi Matyas Water imported solely by Eisner and Mendelson Co., New York." The attention of druggists was called to this Seal brand by advertisements in the trade papers. The Circuit Court was of opinion that, as the word "Hunyadi" had become generic, and was no longer subject to individual appropriation, this label was a sufficient attempt on the part of defendant to assert that it was the seller of the Matyas water, and that from its adoption it freed the defendant from the charge, which before that time was true, that it was cajoling or deceiving the ordinary purchaser into the belief that he was buying the Janos water; and in its decree refused to enjoin the defendant from selling such water under the red and blue label bearing the name "Hunyadi Matyas" in connection with the Seal brand label.

We are of opinion, however, that as defendant's bottle and label are a clear infringement upon those of the plaintiff, it would be destructive to her just rights to permit the use of such bottles and labels by the defendant, notwithstanding the affixing of the Seal brand, which is a mere private mark of the importer. The injury to her is in the simulation of her bottle and label, and she has the right to require that her competitors shall be forced to adopt a style of bottle which no one with the exercise of ordinary care can mistake for hers. While this label may have been adopted in good faith, we do not think its employment would prevent the casual customer from purchasing this water as that of the plaintiff, and

that the injunction should also go against its use and that plaintiff should recover her damages therefor.

We are therefore of opinion that the decree of the Circuit Court of Appeals must be reversed, and the case remanded to the Circuit Court for the Southern District of New York, with directions to reinstate its decree of April 29, 1898, except so far as it denies to the plaintiff an injunction against the use of the Seal brand labels and damages sustained by such use, and for further proceedings not inconsistent with the opinion of this court.

Nos. 30, 31, 32.

Emilie Saxlehner
vs.
The Siegel-Cooper Company.

Emilie Saxlehner
vs.
Rudolph Gies.

Emilie Saxlehner
vs.
Louis Marquet.

[October 15, 1900.]

Mr. Justice BROWN delivered the opinion of the Court.

These three cases were brought against retail dealers, and defended by the Eisner and Mendelson Company, who imported and furnished the defendants with the water sold by them. The bills charged the defendants generally with unlawfully selling bitter water under labels simulating Saxlehner's blue and red label, and under the name "Hunyadi." The answer was substantially the same as that in the main case, and the same record of proofs was used.

In the case against the Siegel-Cooper Company there was no charge of an intentional fraud, and the court found there was no evidence of fraudulent conduct on its part, and dismissed the bill as to that company. As to the other two cases the court found that the clerks in charge of their stores, in response to special requests for Janos water, wrapped up and delivered Matyas water purchased of the Eisner and Mendelson Company. In other words, that they had palmed off the one for the other.

We think that an injunction should issue against all these defendants, but that, as the Siegel-Cooper Company appears to have acted in good

faith, and the sales of the others were small, they should not be required to account for gains and profits. The fact that the Siegel-Cooper Company acted innocently does not exonerate it from the charge of infringement. (*Moet* v. *Couston*, 33 Beav. 578; *Millington* v. *Fox*, 3 Myl. & Cr. 338; *Edelsten* v. *Edelsten*, 1 De Gex., J. & S. 185; Browne on Trade Marks, § 386.)

The decrees of the Circuit Court of Appeals in these cases are also reversed, and the cases remanded to the Circuit Court for the Southern District of New York for further proceedings, &c.

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Test:

Clerk Supreme Court. U. S.